

Dr. Wahbah Al-Zuhaylī's
Al-Fiqh Al-'Islāmī wa 'Adillatuh
(Islamic Jurisprudence and Its Proofs)

Financial Transactions in Islamic Jurisprudence

Volume 1

Translated by: Mahmoud A. El-Gamal, Ph.D

Revised by: Muhammad S. Eissa, Ph.D

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In The Name of Allāh, The Most Gracious, The Merciful

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Translator's Preface

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Mahmoud A. El-Gamal
Houston, TX
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May Allāh reward all our efforts and good intentions.

Abbreviations and Transliteration

0.1 List of abbreviations

Abbreviation	Full phrase	Corresponding Arabic
pbuh	peace be upon him	صلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ ṣallā Allāhu 'alayhi wa sallam
mAbpwh	may Allāh be please with him(her)	رَضِيَ اللَّهُ عَنْهُ (عَنْهَا) raḍiya Allāhu 'anhu ('anhā)
mAbpwt	may Allāh be please with them	رَضِيَ اللَّهُ عَنْهُمْ (عَنْهُمَا) raḍiya Allāhu 'anhūm ('anhūmā)

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Transliteration	Arabic letter	letter name
Short vowels illustrated with consonant “b”		
ba, bi, bu	ب، بـ، بـ	fathat, kasrat, ,dammat
Long vowels illustrated with consonant “b”		
bā, bī, bū	(بَا، بَيْ، بَوْ)	'alef, yā', wāw
Consonants		
'a, 'i, 'u	أ، إ، ع	hamza
b	ب	bā'
t	ت، ة	tā', tā' marbūṭa
th	ث	thā'
j	ج	jīm
h	ح	hā'
kh	خ	khā'
d	د	dāl
dh	ذ	dhāl
r	ر	rā'
z	ز	zāy
s	س	sīn
sh	ش	shīn
ṣ	ص	ṣād
ḍ	ض	ḍād
t̄	ط	tā'
z̄	ظ	zā'
c	ع	‘ayn
gh	غ	ghayn
f	ف	fā'
q	ق	qāf
k	ك	kāf
l	ل	lām
m	م	mīm
n	ن	nūn
h	ه	hā'
w	و	wāw
y	ي	yā'

0.3 Glossary of transliterated technical terms

Transliteration	Translation	Arabic
<u>Shar^c</u> ; <u>Shari'a</u>	Islamic Law	شَرْعٌ؛ شُرِيعَةٌ
<u>Qur'ān</u>	The Revealed Scripture	قُرْآنٌ
<u>Hadīth</u>	Prophetic Tradition	حَدِيثٌ
Sunnah	Prophetic Actions and Traditions	سُنَّةٌ
faqīh, fuqahā'	jurist, jurists	فَقِيهٌ، فُقَهَاءٌ
madhab (pl. madhāhib)	school(s) of jurisprudence	مَذَهَبٌ (ج. مَذَاهِبٌ)
fatwā (pl. fatāwā)	Islamic legal opinion(s)	فَتْوَىٰ (ج. فَتاوَىٰ)
'ijmā' ^c	consensus	إِجْمَاعٌ
'ijtihād	juristic inference	إِجْتِهَادٌ
qiyās	juristic analogy	قِيَاسٌ
'istihsān	juristic approbation	إِسْتِحْسَانٌ
tarjīh	juristic preference	تَرْجِيحٌ
jumhūr	majority (of jurists)	جُمُهُورٌ
halāl	permissible	خَلَالٌ
ḥarām	prohibited	حَرَامٌ
makrūh	disliked; reprehensible	مَكْرُوهٌ
mandūb; mustahabb	recommended; encouraged	مَنْدُوبٌ؛ مُسْتَحَبٌ
fard	obligation	فَرْضٌ
^c aqd	contract	عَقْدٌ
.safqah	contract/deal	صَفْقَةٌ
ṣīghah	language	صِيغَةٌ
rukñ (pl. 'arkān)	cornerstone(s)	رُكْنٌ (ج. أَرْكَانٌ)
shart (pl. shurūt)	condition(s)	شُرُوطٌ (ج. شُرُوطٌ)
rushd	discernment	رُشْدٌ
'ijāb	offer	إِبْحَابٌ
qabūl	acceptance	قَبْوَلٌ

Transliteration	Translation	Arabic
ḥukm al- ^c aqd	legal status of the contract	حُكْمُ الْعَقْدِ
ḥaqq (pl. ḥuqūq)	legal right(s)	حَقٌّ (ج. حُقُوقٌ)
khiyār	option	خِيَارٌ
mawqūf	suspended	مَوْقُوفٌ
ṣahīh	valid	صَحِيحٌ
nāfidh	executable	نَافِذٌ
lāzim	binding	لَازِمٌ
bātil	invalid	بَاطِلٌ
fāsid	defective	فَاسِدٌ
bay ^c	sale	بَيعٌ
māl (mutaqawwam)	(valued) property	مَالٌ (مُتَقَوْوَمٌ)
qabd; tasallum	receipt	قَبْضٌ؛ تَسْلُمٌ
mithlī; dayn	fungible	مُشَبِّهٌ؛ دَيْنٌ
qīmī; ^c ayn	non-fungible	قِيمِيٌّ؛ عَيْنٌ
dayn	debt or liability	دَيْنٌ
t̄haman	price	ثَمَنٌ
qīmah	value	قِيمَةٌ
ṣarf	currency exchange	صَرْفٌ
murābahā	cost-plus sale	مُرَابَحَةٌ
tawliya	sale at cost	تَوْلِيةٌ
wadī ^c a	sale at a loss	وَضْبَعَةٌ
juzāf	gross-sale	جِرَافٌ
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salam	Islamic forward contract	سَلْمٌ
'istishnā ^c	commission to manufacture	إِسْتِصْنَاعٌ
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sharikah; mushārakah	partnership or corporation	مُشَارِكَةٌ؛ شَرِيكَةٌ
'ijār; 'ijārah	lease; hiring	إِيجَارٌ؛ إِجَارَةٌ
qard	loan	قَرْضٌ
'i ^c ārah	simple loan	إِغَارَةٌ
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hibah	gift	هِبَةٌ
'idā ^c ; wadī ^c ah	deposit	إِيدَاعٌ؛ وَدِيَعَةٌ
wakīl; wakālah	agent; agency	وَكِيلٌ؛ وَكَالَةٌ
simsār; samsarah	broker; brokerage	سِمْسَارٌ؛ سِمْسَارَةٌ
fuḍūlī	uncommissioned agent	فُضُولِيٌّ
rahn	pawning	رَهْنٌ
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'amānah	trust	أَمَانَةٌ
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ghubn (fāhish)	(excessive) inequity	غُبْنٌ (فَاحْشَ)
tadlīs; ghishsh	cheating	تَدْلِيسٌ؛ غِشٌّ

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Part I

The Sales Contract (cAqd $Al\text{-}Bay^c$)

Author's plan:

This part consists of six chapters:

1. Constituents of sale.
2. Conditions of sale.
3. Status of sale, its object, and price.
4. Invalid (*bāṭil*) and defective (*fāsid*) sales.
5. Options (*khiyārāt*).
6. Types of sale:
 - (a) Forward sale (*salam*).
 - (b) Commission to manufacture (*'istisnāc*).
 - (c) Currency exchange (*sarf*).
 - (d) Gross-Sale (*jizāf*).
 - (e) Usury (*ribā*).
 - (f) Trust sales: cost-plus sale, sale at cost, and sale at a loss (*murābāha*, *tawliya*, *wadī'a*).
 - (g) Revocation (*'iqāla*).

Chapter 1

Constituents of Sale

This chapter will consist of two sections:

1. The definition of a sale contract, its conditions, and ethical considerations.
2. The cornerstones of a sale, and how it proceeds.

1.1 Definition, legitimacy, and ethics

Definition of sale

A sale (*bay’*) is an exchange of one item for another. The Arabic term *bay’* refers both to the activities of buying and selling (c.f. Qur’ān [12:20] and [2:102]).

The Arabic term *bay’* is derived from the term *bā’* (for arm) because one extends one’s arm to give or take. Another explanation for this derivation is the likely possibility of extending one’s arm to the other to shake hands at the completion of a sale; hence the other Arabic term for a sale agreement *safqa* (literally, a hand-shake).

- For the Ḥanafīs, it means the exchange of an owned commodity (*māl*) for another in a specified manner; or the exchange of an owned commodity for another in a beneficial and special manner. This excludes unbeneficial exchanges (e.g. the exchange of one coin for an identical one), or the exchange of bāds (i.e. items of no worth, e.g. dead animals, or dust).¹
- Al-Nawawī defined sale as “the exchange of an owned commodity for another with the exchange of ownership”.² Ibn Qudāmah defined it similarly, emphasizing both the exchange of ownership, and taking possession by the new owner.³

¹Al-Kāsānī ((Ḥanafī), vol. 5, p. 133), Ibn Al-Humām ((Ḥanafī), vol. 5, p. 73), Ibn Ābidīn ((Ḥanafī), vol.5, p.3 onwards).

²Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol. 2, p. 2).

³Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol. 3, p. 559).

For the Hanafīs, a commodity defined as property (*māl*) must be desirable and possible to save for later use. The commodification and ownership of an object for them can be established by its satisfying those requirements for some or all of the people. Professor Al-Zarqā' criticized this definition and replaced it with the following: "An owned commodity is any identifiable object with a material value for the people".⁴ Therefore, services and mere rights are not considered commodities for the Hanafīs. However, the majority of jurists (*fuqahā'*) consider them potentially owned commodities, because what is desirable in a physical object is its usufruct. In all of the above, a sale always means a contract consisting of an offer (*'ijāb*) and an acceptance (*qabūl*).

Legitimacy of sale

Sales are permissible, with supporting evidence from the Qur'ān, the *Sunnah* (tradition and sayings of the Prophet pbuh), and *'ijmā'* (consensus of the jurists).

In the Qur'ān: "But Allāh has permitted trade" [2:275], "But take witnesses whenever you make a commercial contract" [2:282], "But let there be among you traffic and trade by mutual good will" [4:29], and "It is no crime for you to seek the bounty of your Lord" [2:198].

In the *Sunnah*: The Prophet (pbuh) was asked: "Which are the best forms of income generation?". He replied: "A man's labor, and every legitimate sale",⁵ i.e. devoid of cheating or treason. Another saying of the Prophet (pbuh) is: "A sale must be by mutual consent".⁶ Moreover, the Messenger (pbuh) was sent to mankind while people traded among themselves, and he accepted that practice. He said: "The truthful and honest trader is among the prophets, the righteous, and the martyrs" (Al-Tirmidhī classified it as a *Hadīth hasan*).

'ijmā': Muslims have agreed that sales are permissible, and this only stands to good sense as it allows each individual to meet his needs in cooperation

⁴See the introduction of his *Nazariyya Al-'Iltizām Al-Āmmah fī Al-Fiqh Al-'Islāmī* (pp.114-118).

⁵Related by Al-Bazzār and verified by Al-Hākim on the authority of Rāfi'a ibn Rāfi', and mentioned by 'Ibn Ḥajar in *Al-Talkhīṣ Al-Ḥabīr* on the authority of Rāfi'a ibn Khudayj, who attributed it to 'Alīmad, and mentioned by Al-Ṣuyūṭī in his *Al-Jāmi'* *Al-Saghīr*, on the authority of Rāfi'a Al-San'añī (2nd printing, vo. 3, p. 4).

⁶This is a long *Hadīth*, related by Al-Bayhaqī and 'Ibn Mājah, and verified by 'Ibn Ḥibbān on the authority of 'Abū Sa'id Al-Khudriy that the Messenger of Allāh (pbuh) said: "I shall meet Allāh before I give anyone something owned by another without his consent, for a sale requires mutual consent", and related by 'Abd Al-Razzāq in *Al-Jāmi'* on the authority of 'Abd Allāh ibn Abī 'Awfā as follows: "A sale is by mutual consent, and options are implemented after mutual agreement" Al-Suyūṭī (a, vol.1, p. 102), *Kanz Al-Daqā'iq* (vol. 2, p. 212), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'i), vol. 9, p. 158). Also, Al-Tirmidhī and 'Abū Dāwūd related on the authority of 'Abū Hurayra a *Hadīth* meaning: "No two [should] depart (after a sale) except with mutual agreement", 'Ibn Al-'Athīr Al-Jazarī (, vol. 2, p. 9) and Al-Haythamī (, vol.4, p. 100).

with others trying to meet their own. Therefore, the general rule in sales (*al-buyūc*) is permissibility.

Al-'Imam Al-Shāfi'ī ruled: "The general rule for all sales is permissibility as long as they are concluded by consenting capable decision makers, except for what the Messenger of Allāh (pbuh) has forbidden, or what is sufficiently similar to that which the Messenger of Allāh (pbuh) has forbidden; and anything different from those is permissible following the permissibility of sales stated in the book of Allāh Almighty" (meaning the verses [2:275], [2:282], [4:29], and [2:198] cited above).

Ethics of sales

There are many ethical considerations in sales, including:

1. **The avoidance of excessive profits:** All religions prohibit excessive taking of advantage of buyers as forms of cheating. However, a moderate degree of such taking of advantage is admissible because otherwise, all trade would cease. However, if one side takes too much advantage of the other, the sale may be deemed void. The Mālikī scholars defined excessive disadvantage as a profit of one third or more, since that corresponds to the rules of limited will.⁷ Therefore, a profit rate of one third or less is considered acceptable.
2. **Truthful and complete disclosure of information:** The seller must give full and truthful information about the product, including its type, origin, and cost. Al-Tirmidhī reported the following *Hadīth* on the authority of Rifa'a : "All merchants are resurrected on the day of judgments as sinners, except for those who feared Allāh, treated their customers well, and were truthful".
3. **Ease of conduct:** the seller and the buyer should not be too harsh in their conditions or insist on prices too high or too low. Al-Bukhārī related on the authority of Jābir the following *Hadīth*: "Allāh is merciful to the man who is easy when he sells, when he buys, and when he collects his loans".
4. **Avoidance of swearing, even if truthful:** It is recommended not to swear in the name of Allāh in any sale, since it is disrespectful and unworthy of the name of Allāh, and Allāh has forbidden in the Qur'ān using his name to swear that you will be good to people and fearful of Him. Al-Bukhārī and Muslim narrated on the authority of 'Abū Hurayra the following *Hadīth*: "Swearing destroys the goods, and wipes out their blessings". Swearing by the name of Allāh is criticized thus in the Qur'ān: "And make not Allāh's name an excuse in your oaths against doing good or acting rightly or making peace between persons" [2:224].

⁷Ibn 'Arabī, *'Ahkām Al-Qur'ān* (vol. 4, p. 1804).

5. **Frequent paying of charity:** It is recommended that a merchant pays charity often to atone for whatever swearing, cheating, hiding of information, poor conduct, or excessive profits he may have committed. Al-Tirmidhī, 'Abū Dāwūd, and 'Ibn Mājah reported on the authority of Qays ibn 'Abī Ghurza the following *Hadīth*: "O merchants, the devil and sins are present at each sale, so purify your sales with charity".
6. **Documentation and witnessing of all debts:** It is desirable that all contracts and loans be written, and that witnesses sign for all delayed sales and debts, as Allāh has prescribed in the Qur'ān [2:282].

1.2 Cornerstones of sale contracts

The primary cornerstone (*rukñ*) of a sale for the Ḥanafīs is the offer and acceptance – or other mechanisms – that signify an exchange.⁸ In other words, the cornerstone for completion of a sale is the action or statement signifying the acceptance of the exchange of owned properties. This is how they define a sale contract.⁹

For the majority of *fugahā'*, there are four cornerstones ('arkān) for a sale: the seller, the buyer, the language of the contract, and its object. Those are also parallel to the cornerstones of all contracts. For the majority of jurists other than the Ḥanafīs, the cornerstones of sale are either three or four:¹⁰ parties to the contract (buyer and seller), object of contract (price and what is priced), and language of the contract (offer and acceptance).

The Ḥanafīs view an offer as an action of one of the two parties indicating willingness to engage in a transaction. The offer thus may originate from the buyer or the seller, and acceptance is indicated by the second party. Thus, the offer is defined as the primary action, and the acceptance as the secondary one, regardless of whether they originate with the buyer or the seller.

However, the majority (*jumhūr*) of jurists ruled that an offer originates with the seller, and acceptance originates with the buyer, regardless of who initiates the transaction.¹¹

The discussion of offer and acceptance will cover two issues:

1. The language (*sīgha*) of offer and acceptance.
2. The nature (*sīfa*) of offer and acceptance.

⁸A cornerstone (*rukñ*) for the Ḥanafīs is a necessary part upon which the existence of something depends. For the majority (*jumhūr*), it is a necessary condition for the existence or mental conception of something (not necessarily a part of it, but associated with it). A condition, on the other hand, is necessary for the existence of something without being part of it.

⁹'Ibn Al-Humām ((Hanafi), vol. 5, p. 74), Al-Kāsānī ((Hanafi), vol.5 p. 133), and 'Ibn cĀbidīn ((Hanafi), vol.4, p.5 and what follows).

¹⁰*Sharḥ Al-Minhāj* for Shaykh Zakariyyā Al-'Anṣārī (vol.2, p.180 onwards), and Al-Buhūtī (3rd printing ((Hanbali)), vol.2, p.3).

¹¹Al-Buhūtī (3rd printing ((Hanbali)), vol. 2, o. 3).

1.2.1 Language of offer and acceptance

The form of a contract is the language used for the offer and acceptance if the contract is binding upon two parties, or offer only if it is binding on one alone.

All religions have agreed that the precondition for the existence of a contract and its conclusion is the expression of consent by both parties to have a binding agreement. This is what jurists call “the language of the contract” (*sighat al-aqd*), and lawyers call “expression of intent or will”. It is necessary in the language of the contract that it be standardized and approved by the legislator.

The Hanafīs agree that the language of request such as “sell to me” or “buy from me” does not constitute an offer or an acceptance; while language in the present or past tense such as “I sold you” or “I sell you”, etc. would constitute an offer or an acceptance.

Some differences between sales and marriage

In this regard, a sale contract is different from a marriage contract, since the latter is valid with request statements such as “marry me”, which gives the other party the right to conclude the contract by accepting this proposal. In this way, one party is concluding the marriage contract by representing both sides following that request. In contrast, a sale may not be concluded by one party except in special cases (e.g. a father selling or buying property to or from his son, or a legal guardian transferring properties between himself and the person under his guardianship). A second difference between the marriage and sale contracts is the lack of bargaining in the former. However, in the sale contract, since bargaining is possible, a precise language is needed to specify what is being offered, at what price, etc. before the nature of the contract becomes clear.

In summary, the language of the contract for the Hanafīs can be by two expressions without specifying intent (i.e. in the past tense, as in “I sold ...” or “I bought ...”). This usage of the verb in its past tense is conventionally accepted to signify an offer in the present, and convention supersedes the rules of grammar. Alternatively, the offer and acceptance can be by two verbs in the present tense, indicating intention (since the present tense allows either immediate or future implementation in the Arabic language). In this sense, the offer in the present tense is binding for future actions. A third possibility is using three expressions, via an inquiry by one party (e.g. “would you buy this from me”) or a request/command (e.g. “buy this from me”). In those cases, a third expression is necessary, with the second and third using the present or past tenses to complete the language of the contract. In this respect, the trade may not take place with the expression of a request or order (e.g. “buy this from me for so much”), regardless of intent. Similarly, the use of future tense (e.g. “I shall sell you, etc.”) cannot conclude the contract, since the use of “shall” contradicts a present intention.¹²

¹² Al-Kāsānī ((Hanafi), vol.5, p. 133 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, p.75 onwards), 'Ibn 'Abidīn ((Hanafi), vol.4, p.9 onwards).

In contrast, the Mālikīs, the majority of the Shāfi‘īs, and the Ḥanbalīs have all agreed that the language of the contract – be it a sale or a marriage contract – may be in the form of a request from one party (e.g. “sell to me”) and an acceptance from the other (e.g. “I have sold to you”).¹³

The physical exchange sale

This form of sale (*bay‘ al-mu‘ātāh*) or (*murāwada*) is concluded when a buyer and a seller agree on the object of the sale and its price, and exchange the object for the price without explicit verbal offer and acceptance. An example is when a buyer simply takes the object and gives the seller its price without any words or signals. Jurists disagreed on this contract.

Most of the Ḥanafīs, Mālikīs and Ḥanbalīs have agreed that this form of sale is admissible as long as it is customary and interpreted by the parties to imply mutual agreement. The logic of this admissibility is that the essence of a sale is mutual agreement, which may be obtained in a variety of ways considered customary in any markets.¹⁴

The most accepted opinion of the Shāfi‘īs is that it is necessary for the conclusion of a contract that explicit or implicit words be used to imply offer and acceptance, thus nullifying this form of sale. The logic used by those jurists is based on the Messenger (pbuh)’s *Hadith*: “A sale is but concluded by mutual agreement”.¹⁵ Since agreement or acceptance is a hidden matter, the use of words is necessary to make it possible for witnesses to testify that agreement indeed took place. However, some of the Shāfi‘īs, including Al-Nawawī, Al-Baghwī and Al-Mutawallī have deemed this type of sale acceptable, since an acceptance does not necessarily have to be verbal in their opinion. Al-Nawawī found this the best *fatwā*, while some of the other Shāfi‘īs, including ’Ibn Surayj and Al-Rūyānī allowed physical sale only for less expensive items (e.g. a pound of bread, etc.) to the exclusion of more expensive ones.

It is important to note, however, that there is a consensus among all the jurists that a marriage contract cannot be implemented simply through the actions of its parties, but that the verbal communication of offer and acceptance (to those capable of speaking) is necessary due to the importance of this contract.

1.2.2 Nature of offer and acceptance:

A discussion of *khiyār al-majlis*

Neither the offer nor the acceptance is binding until both have been expressed. Therefore, each party to the contract has the option to withdraw their part as long as the other has not been extended. The question remains, however,

¹³’Ibn Rushd Al-Hafid ((Mālikī), vo.2, p. 168), Al-Khatīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.4), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p. 136).

¹⁴Al-Kāsānī ((Hanafī), vol. 5, p. 134), ’Ibn Al-Humām ((Hanafī), vol. 5, p. 77), ’Ibn Rushd Al-Hafid ((Mālikī), vol. 2, p. 161), ’Ibn Qudāmah (, vol. 3, p. 561).

¹⁵Verified by ’Ibn Ḥibbān.

whether a party may rescind their offer or acceptance after the other party has extended their part. Jurists differed in opinion on this possibility – called *khiyār al-majlis*, or “the option of withdrawal before parting”, whereby an offer or acceptance may be withdrawn as long as both parties are still present.

The Ḥanafīs, the Mālikīs, and the seven jurists of the Madinah¹⁶ have concluded that a contract is binding once the offer and acceptance have been extended, since a sale is an exchange contract that is binding with the conclusion of the expression of offer and acceptance. Therefore, to them, a sale does not allow for “the option of withdrawal before parting”, as ‘Umar (mAbph) said: “A sale is either a contract, or an option”.

Those jurists understand the *Hadīth*: “The two parties to a sale still have the option as long as they have not parted” by interpreting “the two parties” as those who are still in the process of bargaining, and “parted” as a reference to parting before both offer and acceptance have been expressed. They find this interpretation more satisfactory, especially in light of the fact that the apparent meaning disagrees with the verse: “But let there be among you traffic and trade by mutual good will” [4:29], and the verse “O you who believe, fulfill (all) obligations” [5:1]. Some of them even ruled that the *Hadīth* is thus abrogated. Therefore, they equate the “option” (*khiyār*) that is admissible here to the “option of acceptance” (*khiyār al-qabūl* or *khiyār al-rujūl*) that is valid prior to the conclusion of the contract.¹⁷

On the other hand, the Shāfi‘īs, the Ḥanbalīs, Sufyān Al-Thawrī and Ḥishāq ruled: “If the sale is finalized by the satisfaction of offer and acceptance, the contract becomes possible but not binding as long as the two parties to the contract have not parted”. Therefore, each of the two parties would have the option to break the contract as long as they have not parted, and “parting” is defined by convention: that they leave the place where they concluded the sale.¹⁸

Therefore, “parting” refers to the physical separation of the parties to the contract. This is what makes the mention of “parting” meaningful in the *Hadīth*, since it is obvious that each of the parties has the option if they have not expressed an offer or an acceptance.

This is the *khiyār al-majlis* that is known in various trades, according to the strong *Hadīth* narrated by the two Shaykhs¹⁹ that the Prophet (pbuh) said:

¹⁶ The seven *fugahā’* of the Madinah are: Sa‘īd ibn Al-Mosīb (d.94H), ‘Urwa ibn Al-Zubayr (d.94H), Al-Qāsim ibn Muhammad (d.106H), ’Abū Bakr ibn ‘Abd Al-Rahmān ibn Al-Ḥārith ibn Ḥiṣhām (d.94H), ‘Ubayd Allāh ibn ‘Utbah ibn Mas‘ūd (d.98H), Sulaymān ibn Yasār (d.107H), and Khārijah ibn Zayd ibn Thābit (d.99H).

¹⁷ Al-Kāṣānī ((Ḥanafī), vol. 5, p. 134), ’Ibn Al-Humām ((Ḥanafī), vol.5, p.78), ’Ibn Rūshd Al-Ḥafid ((Mālikī), vol.2, p.169 and thereafter), ’Ibn-Rūshd Al-Qurtubī ((Mālikī), vol.5, p.55), ’Ibn Juzayy ((Mālikī), p.274), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.187).

¹⁸ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.43,45), ’Ibn Qudāmah (, vol.3, p.563). Some Hanbalīs ruled that the conventional definition of parting differs for different forms of sale (e.g. in a large market, parting is established by walking away until one does not hear the other’s common talk; and on a ship by going to different levels, and in a house by one leaving, etc. However, if they sleep in the same place or walk together, they have not parted), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.30).

¹⁹ Al-Shaykhān in this context are ’Abū Ḥanīfa and ’Abū Yūsuf, [tr.]

“The two parties to a sale have the option as long as they have not parted, or that one of them has given the other that option”.²⁰ This *Hadīth* has been strongly confirmed. 'Ibn Rushd said that this is among the best supported 'ahādīth, and its many narrations have been documented by 'Ibn Ḥazm in *Al-Muḥallā*.

Thus, they have replied to the Mālikīs and Ḥanafīs that the language of this *Hadīth* does not allow the interpretation they gave (which is “parting in language”) since the thing to be settled between the buyer and seller is not the language, but the price and object of sale. Moreover, their interpretation makes the *Hadīth* vacuous since it is well known that they have the option prior to reaching an agreement. This is the meaning of the saying of “Umar quoted above that “A contract is either concluded or it involves an option”; i.e. that sale contracts may be divided into those with options and those without.

However, this opinion was criticized because it weakens the power of contracts by diluting their binding nature. This can have grave consequences for a variety of legal principles.²¹

²⁰ Al-Ṣan‘ānī (2nd printing, vol.3, p. 33).

²¹ See *Maṣādir Al-Haqq* of Al-Sanhūrī (vol. 2, p. 37 onwards).

Chapter 2

Conditions of Sale

A sale contract must satisfy four sets of conditions: (i) conditions of conclusion, (ii) conditions of validity, (iii) conditions of execution, and (iv) bindingness conditions.¹ The reasoning behind all those conditions is the avoidance of disagreement and protection of the rights of parties to the contract. Those conditions also help ameliorate or remove all uncertainty that can lead to excessive risk. If the conditions of conclusion are not satisfied, then the contract is null. If the conditions of validity are not satisfied, then the contract is invalid. If the conditions of executability are not satisfied, then the contract is suspended and ownership is transferred only if the appropriate permission is given. If the bindingness conditions are not satisfied, then the parties to the contract have the option to conclude or nullify it.

2.1 Conditions of conclusion

The Hanafis have imposed four sets of conditions for the conclusion of a contract. They are conditions regarding: (1) the contractor, (2) the contract itself, (3) the place of the contract, and (4) the object of the contract.²

1. The contractor must satisfy the following two conditions:

- (a) The contractors must be sane and able to run his own affairs, so no contract may be concluded by an insane person or a child who cannot run his affairs. The Hanafis, however, do not make it a condition that the contractors reach legal age, for even a seven year old child who can understand and manage his affairs may conclude a contract. A child's ability to conclude a contract is studied by jurists through the following exhaustive partition:

¹For more details, see 'Ibn 'Abidīn ((Hanafi), vol.4, p.5 and thereafter).

²See also Al-Kāsāni ((Hanafi), vol.5, p.135 and thereafter; vol.2 p.332) and 'Ibn 'Abidīn ((Hanafi), vol.2 p.448).

- i. Purely beneficial dealings (e.g. accepting a gift or charity, or payment of debts by proxy). This type of dealing is valid for any sane child without requiring a permission from his guardian.
 - ii. Sheerly harmful dealings (e.g. divorce, the giving of gifts, the giving of charity, extending loans, or risking the child's money or life by making him a guarantor for other people's debts or life). Such dealings may not be concluded by a sane child under the legal age, even if his guardian approves them, because the guardian himself is not allowed to conclude such purely harmful dealings.
 - iii. Dealings that may result in benefit or harm (e.g. trading, renting properties, marriage, investment, etc.). Those dealings may only be concluded by a discerning child if he can understand them, and either: (a) his guardian approves them while he is still young, or (b) he approves them after reaching legal age.
- (b) The multiplicity of contractors: A sale may not be concluded by one legal proxy for both parties; except for a father, a legal guardian, a judge, or a messenger from both parties; or for a marriage contract. The difference between a sales contract and a marriage contract in this regard is that a sale induces opposing rights, as related to the delivery and receipt of goods, the request to deliver the goods and receive the price, returning the goods in case of discovery of defect, or the request to exercise a valid option. In this regard, it is impossible for one individual at one point in time to be both a deliverer and a recipient, or to make a request and respond to it. Consequently, since the rights allocated by a contract are valid only for the parties to the contract, one individual party to the contract may not assume both sides. The agent (*wakīl*) for two sides in a marriage contract is a special case, since the rights allocated by the contract are not for him, but rather for the principal, and thus he is viewed as a messenger for both sides.
- In sales, the father is an exception since it is assumed that he shares the best interest of his child, and therefore will not go beyond reasonable profit in exchanging his property for his child's. For 'Abū Ḥanīfa and 'Abū Yūsuf, a plenipotentiary commissioned by the father is in the same position as the father, and thus may conduct similar trades. However, Muḥammad determined that analogy (*qiyās*) invalidates such transactions for both the father and the plenipotentiary, but that the father's care for his child is grounds for an exception that does not apply to the plenipotentiary.
- The judge is considered a messenger for both sides, and therefore may conclude a sale between the two parties as a single contractor. This is possible since the judge does not himself get any of the benefits or obligations stipulated by the contract, and thus may – like a messenger – conclude the contract by himself.

The majority of Hanafi scholars, in contrast to the Shafī'īs and Zufar, find it legitimate for one person to conduct both sides of a marriage contract, with an offer that legally constitutes an acceptance. This may be accomplished in five ways: (i) if he is a guardian or legal agent for both sides as in saying: "I married my son to my niece", or "I marry this man whom I represent legally to this woman whom I represent legally"; (ii) the person may represent himself on one side and be a legal agent on the other (e.g. if a woman commissions her potential husband as her legal agent in the marriage contract); (iii) the person may represent himself on one side, and be a legal guardian to the other (e.g. in marrying a young cousin); (iv) the person may be a legal guardian on one side, and a legal agent for the other, as in saying: "I married my daughter to this person whom I legally represent". However, (v) representing oneself on both sides is logically impossible in this context.³

2. Conditions for the contract itself: The only condition in the contract itself is that the offer and acceptance correspond to one another, as detailed below.⁴
3. Conditions for the place of the contract: There is only one condition here as well, which is that the offer and acceptance are both made during the same session, as detailed below.
4. Conditions for the object of the contract: There are four such conditions.⁵
 - (a) The object of the sale must exist. Therefore, it is not permitted to sell a non-existent object, or an object that may cease to exist. Examples of the former include selling the offspring of the offspring of an animal, or selling the fruits of a tree before they appear. Examples of the latter include the sale of an unborn animal in its mother's womb, or sale of the milk in a cow's udder, since both of those may cease to exist.

The proof of all those conditions is that the Prophet (pbuh) forbade the sale of fruit before it is known to be of acceptable quality.⁶ It follows from this that the sale of what is believed to be a jewel but proves to be glass includes a faulty description of the nature of the object of the sale, and thus the sale would be void.

The exceptions to this general rule are *bay' al-salam* (forward sales, with the price collected instantly), *'istisnā'* (the sale of a manufactured object, with partial payments at different stages of production),

³ Al-Kāsānī ((Hanafi), vol.5, p.136), *Mujma' Al-Damanāt* (p.410), *Al-Farā'id Al-Bahiyya fi Al-Qawā'id Al-Fiqhiyya* by Shaykh Maḥmūd Ḥamza (p.139).

⁴ Al-Kāsānī ((Hanafi), vol.5, p. 137).

⁵ Al-Kāsānī ((Hanafi), pp.138-148).

⁶Narrated by the two Shaykhs on the authority of 'Umar (mAbph) who said: "The Messenger of Allāh (pbuh) forbade the sale of fruit before it is known to be of acceptable quality; he forbade both the seller and the buyer" (Ibn Al-'Athīr Al-Jazarī (, vol.1, p.389)).

and – to some Ḥanafīs – the sale of fruits on a tree after some of the fruits are seen.

- (b) The object of sale must be a currently owned and temporarily non-perishable good that may be saved for future use.⁷ Therefore, no contract may be concluded for the sale of what may not be owned such as a free man, or forbidden foods such as wine, pork, blood, etc. 'Abū Ḥanīfa allowed the sale of machines whose primary purpose may be illegitimate, but whose parts may be used in legitimate enterprise, whereas 'Abū Yūsuf, Muhammad and the rest of the 'Imāms do not allow such sales since they encourage corruption.
 - (c) The object must be privately owned by, and in the possession of, the seller. This excludes the sale of non-owned entities such as grazing grass (even in owned land), uncontained waters, wildlife, the sands of the desert and its minerals, sun light, air, etc.⁸
- Note that the ownership of the object of the sale by the seller is not a condition for the conclusion of the contract, but a condition for its implementation, as will be seen below.
- (d) The object of the sale must be deliverable at the conclusion of the sale. Therefore, a sale may not be concluded if the object is impossible to deliver, even if owned by the seller. Examples of the latter are escaped animals, birds, or fish after having been in the possession of the seller.

2.1.1 Eligibility of the parties

It already has been shown that the Ḥanafīs require that both parties to the contract be discerning sane people.⁹ This is in fact a condition for the contract, not for its form. The Ḥanafīs consider children seven years of age and older to be discerning, while the other schools consider children over six years of age to be discerning.

Sale by a discerning child

The Ḥanafīs, Mālikīs, and Ḥanbalīs agreed that a discerning child may buy and sell subject to the consent of his guardian; since the will causing the sale is indeed the guardian's and not the child's, thus the sale is valid. Also, such a permission makes it possible to test the child's judgment in matters of trade before his money is given to him when he reaches legal age.¹⁰

⁷Ibn Ḩāfiṣ ((Ḥanafī)), vol.4, pp.3,150).

⁸The majority of jurists do not allow the sale of uncontained waters such as the waters of seas and rivers, since they are available to all people to the exclusion of no one. However, contained water such as in a well or a spring that are owned by a particular person may be sold. The Zāhirī jurists ruled that the sale of water is forbidden except if it is from a well or a spring that is owned.

⁹Al-Kāṣānī ((Ḥanafī)), vol.5, p.135).

¹⁰Al-Kāṣānī ((Ḥanafī)), vol.5, p.135), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.287), 'Ibn Qudāmah (, vol.4, p.246).

The Shāfi‘īs ruled that the sale of a child is not valid if he is non-discerning, and made it a condition for both buyers and sellers to be of legal age, good religion and character, and have a good source of income.¹¹ Their proof for this opinion is the verse: “To those weak of understanding, make not over your property, which Allāh has made a means of support for you” [4:5]. The common factor between giving such incompetent people the monies and allowing them to trade is the potential for wasting the money illegally.¹²

Sales under coercion

The majority of Ḥanafīs ruled that the contracts of trade, rent, etc. that take place under threat or coercion are defective contracts, since they eliminate mutual agreement that is a condition of contract validity. The proof is in the Qur’ān [4:29]. In this case, the coerced person has the right later to break the contract or to implement it. However, as in all defective contracts, the buyer does obtain ownership at the time of receipt of the price by the seller. The contract is therefore binding once the coerced seller receives the price or delivers the good of his own will. However, unlike other defective trades, the coerced sale becomes valid once the parties accept its terms either verbally or by action, thus eliminating its defectiveness. This is different from other defective sales in which defectiveness is not removed, since in the other cases the defectiveness is due to opposing the Law, whereas in coercion it is defectiveness only for personal reasons. Thus, they concluded that the coerced sale is a suspended defective sale (i.e. it is no longer defective if accepted). Consequently, Zufar ruled that coercion makes the contract suspended. Then, if the coercion is removed and the coerced party accepts the trade, it becomes valid. The author (Prof. Zuḥaylī) finds this to be the better supported argument.¹³

The Shāfi‘īs and the Ḥanbalīs ruled that the contractor must be free and willing when selling his own property, so the sale of a coerced person may not be concluded, based on the verse [4:29], and based on the saying of the Prophet (pbuh): “My people have been forgiven [their actions committed under] errors, forgetfulness, or coercion”.¹⁴

However, coercion to enforce rights does not prevent the completion of a contract because the consent of religious Law (*Shar‘*) supersedes and replaces the trader’s consent. Examples are selling a house to enlarge a mosque, road, or cemetery when needed; or selling a good to pay back a debt or for alimony and support payments for a spouse, children or parents; or to pay taxes.

¹¹ Al-Khatib Al-Shirbī ((Shāfi‘ī), vol.2, p.7).

¹² The Shāfi‘īs ruled (see *Toḥfat Al-Muḥtāj wa Ghayrihā min Shorūḥ Al-Minhāj*): the trades of four may not be concluded: a child, discerning or not, an insane person, a slave even if given an order, or a blind person; such sales is null.

¹³ Ibn ‘Abidīn ((Ḥanafī), vol.4, p.4; vol.5, p.89-91).

¹⁴ Al-Tabarānī related this *Hadīth* on the authority of Thawbān using the phrase “Allāh has forgiven”. Al-Nawawī said it is a good *Hadīth*. It was criticized by Al-Haythamī due to one of the links of its narration being Yazīd ibn Rābi‘a Al-Halabī, and determined that it was weak. It was related by ‘Ibn Mājah, ‘Ibn Ḥibbān, Al-Dāraqutnī, Al-Ṭabarānī, Al-Bayhaqī, and Al-Ḥākim in *Al-Mustadrak* on the authority of Al-‘Awzā‘ī. There are differences among the narrations. See ‘Ibn Hajar (, vol.1, p. 109), and Al-Haythamī (, vol.6, p.250).

The Mālikīs determined that the sale by a coerced person is not binding, and the coerced party then has the option to break or fulfill the contract, as found in the *Mukhtaṣar* of Khalil, and its interpreters. Ibn Juzayy ruled that both the buyer and seller must be contracting of their free will, since the selling and buying of a coerced person is void.¹⁵

Compelled sale

A compelled sale (*bay’u al-mudtarr*) is a sale in which a person is forced to sell part of his property, and the buyer pays an excessively low price. Examples include a judge forcing a person to sell his property to pay his debts, or forcing a Christian or Jew to sell a copy of the Qur’ān or a Muslim slave, etc. The Hanafis have determined that the buying and selling of the coerced is defective (*fāsid*).¹⁶ However, other jurists have permitted it if it is dictated by necessity.

Sale to pre-empt danger

A “sale to pre-empt danger” (*bay’ al-talji’ā* or *bay’ al-’amāna*) is a sale in which a person pretends to sell his property to a third party to avoid being transgressed upon by an unjust person, and the sale is concluded according to all the usual rules and conditions. Jurists disagreed on this form of sale:

The Ḥanbalīs determined that it is a null contract, since the parties did not intend a real sale, and therefore its status is similar to that of parties joking about a contract.¹⁷

The Ḥanafīs and Shāfi’īs determined that it is a valid sale, since all the cornerstones and conditions of the sale contract have been satisfied, and the parties have uttered the offer and acceptance with free intent. This is similar to a case in which two parties agree on a contract-spoiling condition, but then conclude the contract without such a condition. The belief of the person making the contract that he may suffer otherwise does not affect the contract, as all other beliefs do not.¹⁸

Brokerage sale:

Brokerage (*al-samsara*) is the intermediation between a buyer and a seller to conclude a sale, and it is admissible. The compensation that the broker collects is admissible, since it is compensation for work and effort. However, the Shāfi’īs ruled that it is not proper to pay an intermediary for simply advertising the product, if the advertising was costless, since there is no value added by that advertisement, even if it increases the chances of selling it at a high

¹⁵ Al-Shāfi’ī ((Shāfi’ī), vol.2, p.62), *Hāshiyat Al-Dusūqī* (vol. 3, p.6), Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol.2, p.7 and thereafter), Ibn Juzayy ((Mālikī), p.246), and Marī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.5).

¹⁶ Ibn ‘Abidīn ((Hanafī), vol.4, pp. 111,255), Ibn Qudāmah (, vol.4, p.214).

¹⁷ Ibn Qudāmah (, vol.4, p.214).

¹⁸ Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol.2, p.16).

price.¹⁹ There is no harm in one person saying to another: “sell this item for so much, and any extra you may keep or divide between us”. This is based on the *Hadīth* narrated by ’Ahmad, ’Abū Dawūd, and Al-Ḥākim on the authority of ’Abū Hurayra: “Muslims are bound [in contracts and agreements] by their conditions”.

2.1.2 Correspondence of acceptance to the offer

A condition of the sale contract is that the seller accepts all that the buyer had offered to buy, and for the terms he specified.²⁰ So, if one individual says to another: “I have sold you those two items for such a price”, and the buyer replies “I accept in that item only”, pointing to one, the sale is not concluded. Similarly, if one party says: “I sold you this house with all its contents for such a price”, and the buyer replies: “I accept buying the house alone without its contents for such a (lower) price”, the contract is not concluded. In both cases, the buyer would be dividing what the seller is offering to sell, and it is not up to him to do so; especially since sellers often combine the higher quality with the lower quality goods in bundles they attempt to sell, thus enabling the sale of the lower quality goods.

Of course, if the buyer accepts the higher price, the sale is concluded since the one who agrees to pay more for the same item must agree to pay less. In this case, the buyer is only obliged to pay what the seller requested. If the buyer accepts but at a lower price, then the contract is not concluded. Similarly, if the buyer disagrees with the seller on the nature of the price and not necessarily on its quantity, the sale is not concluded. For example, if the seller offers to sell at an immediate (cash and carry) price, but the buyer accepts to buy now and pay in the future; or if the offer and acceptance differ on the timing of future payments, then the acceptance does not correspond to the offer, and the contract is not concluded.

2.1.3 Unity of the contract session

It is required that the offer and acceptance be uttered in the same session, where both parties are present, or in a session where the absent party knows of the offer.²¹

¹⁹ Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol.2, p. 335), and in the *Iḥyā* of Al-Ghazālī: It is not permissible to receive compensation for an endorsement by a physician of a medication that only he knows, since such an endorsement is effortless; unlike the skilled sword-maker who has to exert effort to straighten a sword with one hit, and he is entitled to a reward [even if it is too large]. This is the case since acquiring the necessary skill to perform the job without effort itself requires much effort. Al-Qaffāl declared an opinion (*fatwā*) that he may not be hired, which is the majority opinion, even though Al-’Adhra’ī agrees with the view of Al-Ghazālī.

²⁰ Al-Kāṣānī ((Hanafī), vol.5, pp.136-7), Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol.2, p.5 and thereafter), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.136), and Yūsuf Mūsā’s *Al-’Amwāl wa Nazariyyat Al-’Aqd* (p.256).

²¹ Al-Kāṣānī ((Hanafī), vol.5, p.137 onwards), Al-Kāṣānī ((Hanafī), vol.5, p.80), and Dr. Yūsuf Mūsā’s *Al-’Amwāl* (p.257).

According to this condition, if one party made an offer, and the other party left the session before accepting, or was occupied with another business that disengaged him from the first party, then he later accepted, the sale is not concluded. This does not mean that acceptance has to be instantaneous, for the acceptor may need to ponder the offer.

The Mālikīs ruled that separation between the offer and acceptance does not harm the sale contract, unless (as determined by convention) one of the parties was disengaged from the transaction.²²

The Shāfi‘īs and Hanbalīs ruled that acceptance must follow the offer, but not by a long period. A long period is defined as one that may indicate that the second party does not wish to accept. The contract would be harmed if a discussion outside the scope of the contract ensues between the offer and the acceptance.

Contracting while walking or riding

If the parties conduct a sale while walking or riding the same or adjacent vehicles, then if the offer and acceptance were uttered in sequence without interruption (even while moving), the contract is concluded. However, if there was a period of silence between the offer and acceptance, even a short one, then the contract is not concluded, since movement in this case changed the “session” (*majlis*). In analogy, the jurists extended this ruling to the recitation of a prostration (*sajda*) verse, or an offer to a man’s wife to divorce herself if she wishes. In the former case, the person does not have to perform the prostration if he is walking or riding, and in the latter case, the option to the wife becomes void by her walking or riding since that option is restricted to the session (*khiyār al-majlis*).²³

If the parties conduct the sale while standing up, it is concluded. However, if one makes an offer while they are standing, then one or both start walking, the contract is not concluded since the session has been changed before acceptance. In this case, walking is considered a rejection of the offer.

In a special case, if a husband stands up and gives his wife the option, then he walks away while she is still standing, then she still has the divorce option. But if she walks and he stays standing, her option is void. In this case, it is her adherence to the session that matters and not her husband’s, since she has not given any indication of rejecting the offer. As for the husband, his walking away or rejection cannot nullify the option since it is binding once it is offered. This is unlike a sale, where either of them may cancel the sale by walking away.

Contracting on a ship or airplane

If the two parties make a contract on a ship, airplane, or train, the contract is concluded, whether the vehicle is moving or stationary. This is different from

²²See *Hashiyat Al-Ṣāwī c̄alā Al-Sharḥ Al-Saghīr* (vol.3, p.17).

²³Sheikh Mahmūd Hamza’s *Al-qawāḍid Al-fiqhiyya*.

walking or riding on the ground, since stopping those means of transportation is under the control of the parties. Thus the entire ride on a ship, airplane or train is considered a single session, no matter how long.

Contracting with an absent party

If one party extends a selling or buying offer to an absent party, and the absent party receives that offer and accepts it, the sale is not concluded. The fundamental rule on which this is based is that one of the two halves of the contract is only valid for that session and not beyond, unless the absent party commissions a proxy they contract by messenger, or they conduct the contract by written correspondence.²⁴

Contracting via a messenger

An example of this transaction is to tell a messenger: “I have bought such-and-such an object from the absent person so-and-so for such an amount of money, so go to him and say: ‘so-and-so has bought this object from you for so much.’” Then, the messenger arrives and delivers his message. If the second party accepts the offer in the same session during which the message is delivered, then the sale is concluded. This is valid since the messenger represents the first party, as if he were present and making the offer, so when it is accepted in the same session, the sale is concluded.

Contracting by written correspondence

An example of this case is when one party writes a letter stating: “I have purchased such-and-such an item for such an amount of money”. The second party receives the letter, and announces acceptance of the written offer during the same session in which he received it. The sale is thus concluded. In this case, the written letter becomes a proxy for the absent party, as if he were present at the session where the offer and acceptance were communicated to the two parties. However, if the recipient of the message delays acceptance until a later time (after the end of the session – *majlis*), then the sale is not concluded.

The person sending an offer letter may rescind that offer in the presence of witnesses provided that this takes place before the other party’s acceptance, and the arrival of the message. However, the majority of Mālikī jurists find that the originator of the offer may not rescind it before he gives the other party an opportunity to respond. The length of the period that constitutes such an opportunity is to be determined by convention.

Note that unity of the session (*majlis*) is also a condition for the conclusion of a lease contract or a gift.

²⁴Al-Kāsānī ((Hanafi), vol.5, p.137 onwards), and 'Ibn Al-Humām ((Hanafi), vol.5, p.79).

Divorce and *khuf'*

As for divorce, the part of the contract originating from the husband continues to be valid, and may be accepted by the other party after the session is over. For instance, if a man says: "I have divorced my absent wife, on the following terms", and she receives the news and accepts the terms, then the divorce is concluded.

Marriage

For 'Abū Ḥanīfa and Muḥammad, marriage is treated the same way in this context as sales, so one side of the contract may not be suspended beyond the session, unless the absent party is represented by a consenting proxy who accepts the offer. For example, if a man or woman says in the presence of witnesses: "witness that I have married so-and-so for such-and-such terms", and the other party receives the news and accepts, the contract is not concluded for 'Abū Ḥanīfa and Muḥammad unless the absent party is represented by a proxy who accepts on behalf of the absentee in the session of the offer.

For 'Abū Yūsuf, however, half of the marriage contract is suspended beyond the session and may be validly accepted by the second party, even if not represented by a proxy who accepts in the session of the offer.

The principles of unity of a *safqa*, and its parting

The term *safqa* in Arabic (literally: the impact of a strong handshake) is used to signify the contract itself.²⁵ Al-Nawawī said that *safqa* is a name for sales contract since it was customary for each of the contractors to slap his hand loudly with his counterpart's hand at the conclusion of the contract.²⁶

As discussed above, the sale contract is composed of an object of sale, a price, a seller, and a buyer, together with a sale and a purchase. With the combination of some of those items or their parting, the contract may be unified or dissolved.²⁷

Jurists agreed on the necessity of combining all the elements of a contract as a matter of principle, since one condition for the conclusion of sale is the one we mentioned above: that the acceptance corresponds to the offer. However, there are some partial disagreements about the satisfaction of this principle or lack thereof; the latter corresponding to the dissolution of the contract.

In this regard, the Ḥanafis argued²⁸ that it is necessary to understand the unification of the contract, or its partition; both with respect to the parties of the contract, and the object of sale.

1. With respect to the parties of the contract: If the side making the offer is unitary – whether a seller or a buyer – and the recipients of the offer

²⁵ Ibn Al-Humām ((Hanafi), vol.5, p.80).

²⁶ Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'i), vol.9, p.524).

²⁷ See *Al-`Ināya*, and Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'i), vol.9, p.432 onwards).

²⁸ Ibn Al-Humām ((Hanafi), vol.5, p.80), Al-Kāsānī ((Hanafi), vol.5, p.136 onwards), 'Ibn c-Ābidīn ((Hanafi), vol.4, p.20).

were more than one, then the recipients may not partition the contract by some of them accepting and some rejecting the offer. Similarly, if the offer is made by a group, the recipient of the offer may not accept the part of the offer pertaining to one of the offerers. In those cases, the contract is not concluded unless all the recipients accept the entire offer. If, for example, a buyer makes an offer to a number of sellers, and some accept while others do not, then the contract is partitioned, and the sale can only be concluded with a new acceptance.

2. With respect to the object of sale: Even if the parties making the offer and accepting it are unitary, the acceptor of the offer may not accept part of the contract pertaining to a portion of the merchandise.

If the parties are both unitary, but the objects of the sale are fungible (*mithli*), or some fungible and some non-fungible (*qimi*),²⁹ then the buyer may not accept to purchase some of the merchandise but not all. In this case as well, the contract would have been partitioned, and the sale can only be concluded with a new acceptance from the primary party. In this case, the new acceptance may conclude the sale contract by making the partial acceptance an offer, and the secondary acceptance an acceptance (while the initial offer is no longer valid since it is implicitly rejected).

Note that there is a difference between those two cases with respect to the manner in which the price would be distributed, as well as the unity of the contract or its partition. For, if the objects of the sale were fungible (e.g. two bags of rice, or two pounds of iron), and the buyer accepts one of them, then the price is divided in proportion; since the price of fungible items is divided in proportion to its parts. In this case, the contract is unified.

However, if the merchandise were non-fungible, e.g. two unique pieces of cloth or two particular animals, then the price may not be divided in proportion to the number of parts, since the parts are not identical. In this case, the partial acceptance leaves the parts of the offer with undetermined prices, and indetermination of the prices nullifies the sale. To correct this situation, one of two procedures may be followed:

- (a) Either the offer is repeated; e.g. by saying: “I sell you those two items, this one for so-much, and that one for so-much” (or similarly for the buyer if he originates the offer), then the contract is valid, and it in fact becomes two contracts.
- (b) Alternatively, the offer may partition the sale at the inception of the offer (e.g. “I will sell you those two items, this one for so-much, and that one for so-much”). In this case, the acceptor is not partitioning the contract, but it is indeed already partitioned, and he may accept

²⁹ **fungible:** being of such nature that one part of quantity may be replaced by another equal part or quantity of an obligation (oil, wheat and lumber are fungible commodities), *Merriam-Webster Collegiate Dictionary*, 10th edition, 1993, p. 473. [tr.]

whichever part(s) he wishes, and reject the others. Had the seller intended to sell the two items only in one transaction, there would be no use in specifying the price of each separately.

If the offer and acceptance correspond to one another (i.e. agree on the object, the price, etc.), then the sale is binding, and neither party has an option, unless a defect is found in the merchandise, or if it were not inspected before. In item #351 of *Al-Majalla*, the following was stated: “If some merchandise was sold in a single contract, and then some of it was found defective then: if the price has not been received, the buyer has the option to return the entire merchandise, or to keep it all for the full price. However, the buyer does not have the option to return the defective parts only and keep the rest. If the price has already been collected, and if separating the merchandise does not lead to loss or harm, he may return the defective parts in exchange for its portion of the price were it not defective. In this case, he may not return the entire merchandise unless the seller agrees. And if the separation of the merchandise may lead to loss or harm, then either the entire merchandise is returned, or it is all accepted at the full price ... ”

'Abū Ḥanīfa and the Mālikīs ruled³⁰ that if the sold merchandise contains a mixture of admissible and prohibited goods (such as wine, pork, etc.), then the entire sale is void. 'Abū Yūsuf and Muḥammad ruled that the contract is valid for the good merchandise, and defective for the defective. The origin of disagreement between 'Abū Ḥanīfa and his two colleagues is that for 'Abū Ḥanīfa, the defectiveness of part of the sale agreement renders the entire agreement defective, whereas his two colleagues consider the good part of the sale still valid.

If a person sells items he owns together with items owned by another in one sale agreement, the sale is valid, and binding only for the part that the seller owns. The sale is not binding for the part owned by another unless the other person allows it. The Ḥanafīs and Mālikīs agree on this since they allow for the suspended (*mawqūf*) or uncommissioned agent (*fudūlī*) sale, as discussed below.

The majority of the Shāfi'īs and Ḥanbalīs studied³¹ the “partition of a contract” in the case of sales of legitimate and prohibited goods in one contract for one price in three cases:

1. The sale of a known and an unknown item for one price (e.g. “I sell you this book and another that I own for such a price”). In this case, the sale is void, since the unknown may not be sold, and the price of the known is unknowable.
2. The sale of divisible goods that are jointly owned by one of the owners without the permission of the others. In this case, the sale is valid for the

³⁰Ibn Juzayy ((Mālikī), p.260), and Al-Kāsānī ((Ḥanafī), vol.5, p.217).

³¹Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.9, pp.425-437), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p. 269), 'Ibn Qudāmah (, vol.4, p.236 onwards), 'Ibn Rajab's *Al-Qawā'id* (p.421), Al-Suyūtī ((Shāfi'ī), p.98), Marṣī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.16).

portion owned by the seller at its portion of the price. The sale is void for that which is not owned by the seller.

3. The sale of goods that are non-fungible, or whose price is not divisible in proportion due to the uniqueness of the components (i.e. *qīmiyyāt*), while some of the goods are permissible and others are forbidden (e.g. a lamb and a pig, or a bottle of wine and a bottle of vinegar for one stated price). In this case, the better of two opinions for Al-Shāfi‘ī, and in a related opinion of ‘Ibn Hanbal, renders the sale valid in the permissible goods and void for the forbidden.³² As for the division of the price, items are priced the same as their closest counterpart (e.g. commissioning the pig the same price as the lamb, or the wine the same price as the vinegar). This is what was stated by those who related this first opinion of ‘Ahmad. However, the Ḥanbali jurist ‘Ibn Qudāma found the second related opinion of ‘Ahmad that the entire sale is void.

If the sale consisted of the property of the seller and the property of others, the price may not be divided in proportion. The favored opinion among the Shāfi‘īs is that the sale of that which is owned by the seller becomes valid, while the sale of the other items becomes void; but the price is divided based on the value of the items. As for the Ḥanbalīs, the entire sale is void in this case.

As for the option of partitioning the sale, the Ḥanbalīs and Shāfi‘īs ruled that if part of the sale is valid, then if the buyer knows the situation (e.g. that the merchandise and its price are divisible), he has no option, since he bought while knowing the conditions of the merchandise. On the other hand, if the buyer did not know, e.g. by thinking that all the merchandise was owned by the seller only to discover that he owns only half, then he has the option to break the contract or uphold it. The seller in this case – if the buyer decides to keep the valid part of the sale – does not have the option in the more favored opinion, since he willingly accepted exchanging his part of the merchandise for the appropriate portion of the price.

If part of the merchandise sold in one contract is spoiled before the buyer receives it and before the seller receives the price, then the contract is unanimously seen as void for the spoiled part. As for the rest of the merchandise, the buyer has the option to keep the unspoiled merchandise at the agreed price, or to void the entire contract.

The Zāhirīs ruled that every sale agreement that combines a legitimate portion and a prohibited one is void in its entirety.

In summary: the majority of jurists (*jumhūr al-‘ulamā’*) deem the mixed sale that contains permissible and prohibited components, or owned and unowned merchandise, to be void. The Shāfi‘īs, on the other hand, lexically Al-Nawawī

³²This explains the common statement of the Shāfi‘īs about “the two statements on the partition of a sale agreement”. The first and stronger statement for the Shāfi‘īs is that the agreement is partitioned, permitting the sale of the permissible, and voiding the other, and their second opinion is that the sale may not be partitioned, and thus it all becomes void.

who favored this opinion ruled that the contract is valid for the permissible part, and void for the impermissible part.

2.2 Conditions for the executability of a sale

There are two conditions for the executability of a sale:

1. **Ownership or guardianship (*wilāya*):** Ownership is the possession of an item where the possessor is alone capable of freely using it in the absence of legal constraints. In this regard, the guardian of an underage child or an insane person, is not considered an owner of that person's property. However, the underage child or the insane person are considered the owners, even though they may not freely use the objects due to the legal constraint of being under another person's guardianship.³³

Guardianship: There are two types of guardianship.

- (a) Original: A person is fundamentally a guardian for himself.
- (b) Agent/vicarious: For those who may not legally represent themselves (e.g. due to being underage), a guardian may be commissioned.

The legal order of legal agents is as follows: the father, then his plenipotentiary, then the grandfather, then his plenipotentiary, then the judge, then his plenipotentiary.³⁴

The result of this condition is that the merchandise must be owned by the seller, so the uncommissioned agent (*fudūlī*) sale is not executable due to lack of ownership or legal agency. However, the Ḥanafīs ruled that the *fudūlī* sale is suspended pending the agreement of the owner. Al-Shāfi‘ī, on the other hand, considered ownership or legal agency a condition of conclusion, thus voiding the transactions of an uncommissioned agent (*fudūlī*).³⁵

2. **No third party should have rights over the object of sale:** If anyone other than the owner has a legal right to ownership of the merchandise or its usufruct, then the contract is suspended. Hence, the seller cannot sell what he has pawned or rented. The sale is thus considered suspended and dependent for executability on the consent of the other parties. This is the best accepted opinion among the Ḥanafīs, since the cornerstone of the sale was satisfied, and since there is no coercion to any party of the contract.³⁶ The buyer in this case has the option to conclude the sale or to void it. As for the other party who has a vested interest in the sale object (e.g. a tenant or pawn-broker), if they allow it, the contract will be executable. If the renter of a property does not allow the sale, then it

³³ *Al-'Amwāl wa Nazariyyat Al-'Aqd* (p.165).

³⁴ ibid. (p.148), 'Ibn 'Abidīn ((Ḥanafī), vol.4, p.6), Al-Kāsānī ((Ḥanafī), vol.5, pp.146,155).

³⁵ Al-Kāsānī ((Ḥanafī), vol.5, p.148).

³⁶ Al-Kāsānī ((Ḥanafī), vol.5, p.155), 'Ibn 'Abidīn ((Ḥanafī), vol.4, pp.6,145-148).

may only be executable after the end of the rent contract. Similarly, the pawnner may have to repay the pawn-broker before the sale is executable. This – according to 'Ibn 'Ābidīn – is the correct opinion.

Based on this opinion, the sale of a middle man becomes admissible but suspended dependent on the consent of the owner. In this case the contract may be broken by the buyer, but the dependence on the consent of the owner is not viewed as a breaking of the contract. Also, the middle-man may break the contract, except in the case of marriage.

Professor Muṣṭafā Al-Zarqā' said: The best juristic opinion is that a sale may not be suspended pending the consent of a pawn-broker or a renter, even though they do have some legal rights regarding the object of sale, since such suspension is only valid legally for an owner or a legal agent. On the contrary, he says, the sale is executable, but the delivery of the good requires the consent of the pawn-broker or the renter to guarantee their rights. In this case, the buyer is given the option of voiding the contract, or waiting for the pawned good to be freed, or the rent contract to expire, before receiving the purchased items.³⁷

Executable and suspended sales

Given the Ḥanafī conditions for executability³⁸ of a sale listed above, it can be seen that there are two types of sales: executable and suspended.

Executable sale: This is the type of sale in which the cornerstones of the contract, its conditions of conclusion, and its conditions of executability are all satisfied.

Suspended sale: This is the type of sale in which the cornerstones and conditions of conclusion of the contract are satisfied, but the conditions of executability (ownership and guardianship) were not.

As seen above, the conditions of executability may be violated in the object of sale (as in the sale by an uncommissioned agent) or in the behavior of parties to the contract (as in the sale or purchase by a young discerning child, or an incompetent person).

Jurists' views on uncommissioned agent

An uncommissioned agent (*fudūlī*) is someone who makes a transaction or signs a contract without having the legal authority or representation to do so. Examples are when someone sells or buys for another, or rents on behalf of another, without being a legal proxy, agent, guardian, or plenipotentiary with the right to make such a contract, and without taking permission.³⁹ One person selling

³⁷ *cAqd Al-Bayc* (p.31), 'Ibn 'Ābidīn ((Hanafī), vol.5, p.371).

³⁸ Here we use "conclusion" for '*in*c*iqād*' ("the contract is concluded" = *tamma al-*c*aqd* or '*in*c*aqad*'), and "executability" for *nafādh*. [tr.]

³⁹ Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.171), *Al-'Amwāl wa Nażariyyat Al-*c*Aqd* (p.380), *'Uṣūl Al-Buyūc Al-Mamnuū'a* by Prof. 'Abd Al-Samīc (p.134).

the property of another has become very common in everyday dealings; e.g. men selling the property of their wives, or individuals selling the property of the state, or the property of person missing for a long time.

Notice that the uncommissioned agent is dealing in property that is clearly owned by another, otherwise (if the other party thinks that the property is his), it would be considered selling what he does not own, which is prohibited. What is being considered here is the uncommissioned agent's sale of the property of another, with the condition that the owner has the option to make the sale executable, or to void it. Similarly, the uncommissioned agent may buy an item for a third party without their permission, with the condition that the ultimate buyer has the option to accept or void the purchase.⁴⁰ Jurists differ in opinion regarding the dealings of uncommissioned agents:

The Ḥanafīs distinguished between the cases of sale and purchase. In the case of a sale, the dealings of the uncommissioned agent are deemed valid but suspended, whether the uncommissioned agent or the owner is listed as the seller in the contract. It is suspended since if he signs as the seller, he cannot execute the contract.

In the case of purchase, if the uncommissioned agent lists himself in the contract as a buyer, with the intention of buying for another person, he is considered the buyer if his own trading is executable. In this case, the rule appeals to the principle that a person's dealings are normally for himself and not for another.

If the buyer listed in the contract is other than the uncommissioned agent, or if his purchase is not executable (due to being a child, or one with legal restrictions on his dealings) then the purchase is valid but suspended conditional on the approval of another person or the person for whom the purchase was intended. If the intended buyer approves the transaction, it is executable, and the uncommissioned agent is considered ex post authorized.

In summary: the dealings of an uncommissioned agent is deemed by the Ḥanafīs to be admissible but suspended pending the approval of the relevant party.⁴¹ In this context, the trades of the uncommissioned agent, together with the sale of surrendered property, the sale of coerced person, and the sale of a legal proxy, are among the special cases of the sale of what one does not own.

The Mālikīs consider the dealings of the uncommissioned agent and his trade contracts in general to be concluded and suspended pending the permission of the affected party. If the affected party approves of the contract, it becomes valid and executable, otherwise it is void. This is based on

⁴⁰ Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.171).

⁴¹ Al-Kāṣānī ((Hanafi), vol.5, pp.148-150), Ibn Al-Humām ((Hanafi), vol.5, p.309 onwards), Ibn Ḩābidīn ((Hanafi), vol.4, pp.5-6).

the view that ex post permission is similar to ex ante permission or legal representation.⁴²

The Ḥanafīs and Mālikīs have cited as proof of their opinion the verses of trade that are general, and did not offer any special treatment of the case of uncommissioned agents. In this regard, they cite the verses: “But Allāh has permitted trade” [2:275], “But let there be among you traffic and trade by mutual good will” [4:29], and “And when the prayer is finished, then you may disperse through the land, and seek of the bounty of Allāh” [62:10], all of which mention trade positively in general terms.

Also, the uncommissioned agent is (generally assumed to be) of legal age and of good mental status, thus allowing his transactions is more appropriate than nullifying them. Moreover, the contracts may indeed bring benefit to the party he represented, and there is no harm since the person he represented without authorization has the option to void the contract if it is not beneficial. It is narrated in Al-Bukhārī and elsewhere that the Messenger (pbuh) gave ‘Urwa Al-Bāriqī one *dīnār* with which to buy one lamb, but he bought him two lambs for the one *dīnār*. He then proceeded to sell one of the lambs for one *dīnār*, and returned to the Messenger (pbuh) with one lamb and one *dīnār*. The Messenger (pbuh) said: “May Allāh bless your trades”. It was narrated by Al-Tirmidhī and Abū Dāwūd on the authority of Ḥakīm ibn Ḥizām that the Prophet (pbuh) gave him one *dīnār* to buy him a lamb for sacrifice. He then proceeded to buy two lambs for the one *dīnār*, and sold one of them for one *dīnār*, and returned to the Messenger (pbuh) with one lamb and one *dīnār*. The Prophet (pbuh) commended him and prayed for him to be blessed by saying: “May Allāh bless your trade”.⁴³ Note that the Prophet (pbuh) in both versions of the story did not order the second lamb to be either bought or sold.

The Ḥanbalīs ruled⁴⁴ that the dealings of the uncommissioned agent are never valid in trade or otherwise, even if his dealings are approved ex post. The exception is when the uncommissioned agent purchases for himself with the intention of purchasing for another person who is not mentioned in the contract, in which case the contract is valid. Similarly, if he bought some goods on a cash-and-carry basis and had the intention that he was buying for another person who was not mentioned, then the sale is valid. In these cases, if the unmentioned party intended for the purchase approves it, the merchandise becomes his from the moment of purchase; but if he does not approve it, then the middle person becomes the buyer. ’Ibn Rajab ruled that dealings of the uncommissioned agent are permissible and suspended pending permission if necessity dictates dealing in the property and rights

⁴² Ibn Rushd Al-Hafid ((Mālikī)), *Hāshiyat Al-Dusūqī* (vol.3, p.12), ’Ibn Juzayy ((Mālikī), p.245).

⁴³ Al-Ṣan‘ānī (2nd printing, vol.3, p.31).

⁴⁴ Al-Buhūtī (3rd printing (Hanbalī), vol.2, p.11 onwards), ’Ibn Rajab (1st edition (Hanbalī), p.417), Marṣī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.8), *Maṭālib ’Uwlī Al-Nuhā fī Sharḥ Ghāyat Al-Muntahā* (vol.3, p.18).

of another person, and obtaining permission was impossible due to not knowing his identity, his absence, or the difficulty of waiting for him.

Item (13) of the project to legalize the *Shari'a* following the school of 'Imām 'Ahmad states: "The dealings of an uncommissioned agent are invalid, even if approved ex post, unless he buys for himself with the intention of buying for a person whom he does not name, then it is valid".

The Shāfi'īs and the Zāhirīs ruled that it is necessary for the item being sold to be owned by the one engaged in the contract. Hence, the sale by an uncommissioned agent is invalid at its origin since it cannot even be concluded, thus making the permission of the affected party irrelevant. Their proof for this opinion the *Hadīth hasan* narrated by 'Abū Dāwūd and Al-Tirmidhī that the Prophet (pbuh) said: "There is no sale except in what you own". The prohibition of selling what one does not own has also been correctly reported.⁴⁵ This is due to the uncertainty induced by the possible inability to deliver to the sold items at the end of the contract, and the conflicts that may ensue. They said with regards to the *Hadīth* of 'Urwa Al-Bāriqī or Ḥakīm ibn Hizām that it is valid due to his being an unrestricted legal agent of the Prophet (pbuh), since he bought the lamb and delivered it.⁴⁶ Thus, it is a legal representation where the agent diverged to improve the lot of the person whom he represented, and therefore his dealings are executable. Thus, the Shāfi'īs and Zāhirīs view the purchase of an uncommissioned agent as a purchase for himself, and ruled that ownership does not transfer to a third party except via a new contract. This is also the opinion of the Ḥanafīs.

Validity of the dealings of an uncommissioned agent

The Ḥanafīs stipulated the following three conditions for the validity of a contract by an uncommissioned agent:⁴⁷

1. A person who can validate the deal must exist at the time of the contract, since it is then possible for this person to give permission to conclude the contract following the actions of the middle person in the same session. However, if the person who can give such a permission is not known to exist, then permission may not be given during that session, and a future permission may or may not be forthcoming. Thus, if an uncommissioned agent divorces the wife of a man of legal age, or gave his property as a gift or charity, his actions conclude the contract but it is suspended pending

⁴⁵The text of the *Hadīth* was narrated by 'Ahmad and 'Aṣḥāb Al-Sunan Al-'Arba'a on the authority of Ḥakīm ibn Hizām, that the Prophet (pbuh) said to him: "Do not sell what you do not have", which was deemed *Hadīth hasan* by Al-Tirmidhī, c.f. Al-Ḥāfiẓ Al-Zaylānī (1st edition, (*Hadīth*), vol.4, p.45), Al-Shawkānī (, vol.5, p.155).

⁴⁶Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.15), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.9, pp.281,284 thereon).

⁴⁷Al-Kāsānī ((Hanafi), vol.5, pp.149-151), 'Ibn Al-Humām ((Hanafi), vol.5, p.311), 'Ibn c-Ābidīn ((Hanafi), vol.4, p.142).

permission. In this case, the concerned party could have initiated these contracts by himself, thus he may approve them after they occur. In this sense, a person who can validate the deal does exist at the time of the contract. However, if the uncommissioned agent attempts to do the same on behalf of a child, then the contract is not concluded, since the child does not have the ability to conclude such contracts on his own, and the child's guardian does not have the ability to conclude them on his behalf. In this case, a person who can validate the contract does not exist at the time of the contract.

2. Validation (giving of permission) must take place while the buyer, seller, owner, and merchandise all exist. Thus, if a contract is approved after one of those had perished, the contract is void and approval of it does not matter. This is the case since such approval is with respect to a contract, whose cornerstones (the parties to the contract, and its object) must exist at the time.
3. That the uncommissioned agent does not have the ability to execute the contract if the concerned party refuses.

Nullification of uncommissioned agent contracts

The contract (e.g. a sale) by an uncommissioned agent may be nullified by: (i) the owner of the property, (ii) the middle person himself before the sale is approved by the owner to avoid the obligations he would have if the owner approves it, or (iii) the buyer who may decide to avoid possible harm in buying from a party other than the owner.

As for the marriage contract, the uncommissioned agent may not nullify it since it is a contract whose rights and obligations are all allocated to the concerned parties.⁴⁸

Validation of the contract of an uncommissioned agent may only come from the owner or others who have rights associated with the item of sale. Moreover, validation may only take place if the buyer, seller, and object of sale are all unchanged (since validation of this contract is legally equivalent to concluding a direct sale). Also, if the object of the sale is unique, its price must remain unchanged. The object of the sale must remain unchanged. This follows since it is in the interim owned by the middle person, and thus if it perishes, it perishes in his property.⁴⁹

One uncommissioned agent for two parties

If an uncommissioned agent sells someone's house to another person and accepts for the buyer, while both are absent, or if he marries a man to a woman and accepts for both sides, the contract is not concluded. This ruling follows from the condition of multiplicity of the parties to the contract, as explained above. Thus,

⁴⁸ Al-Kāsānī ((Hanafi), vol.5, p.151), 'Ibn Al-Humām ((Hanafi), pp.309-312).

⁴⁹ 'Ibn 'Abidīn ((Hanafi), vol.4, p.146 thereon).

the offer in contracts of sale, marriage, etc. may not be suspended conditional on the acceptance of an absent party. On the contrary, the offer becomes void, and later permission may not conclude the agreement.

Therefore, if one person is an uncommissioned agent for both sides of a marriage contract, or if he is an uncommissioned agent for one side while representing the other party (that party being himself, someone he legally represents, or for whom he is a guardian), then his offer is not suspended. Such an offer is considered by 'Abū Ḥanīfa and Muḥammad to be void, whether he spoke only for one side (by only making the offer), or for both sides (by making an offer and an acceptance). 'Abū Yūsuf ruled that the offer of an uncommissioned agent is suspended pending acceptance by the absent party, and it is suspended pending acceptance by both parties if it is accepted by another uncommissioned agent. For example, if two uncommissioned agents marry a man to a woman without their knowledge, it would be valid but suspended conditional on their acceptance. Then, if they accept, the contract is executable, otherwise it is not.

The two parties argued thus: The acceptance by an uncommissioned agent is legally unacceptable, since the offer extended by the uncommissioned agent without a potential acceptor in the session (not even another uncommissioned agent) was invalid from its inception. Thus, it is not suspended pending acceptance of an absent party, and later acceptance does not change its invalidity.

In other words, all that exists at the time of the offer is half of a contract, and the other half may not be realized without legal representation through guardianship.

The argument of 'Abū Yūsuf, on the other hand, is that the expression of the uncommissioned agent contains both halves of the contract, and hence it is valid as it would be in the presence of a legal agent or guardian.⁵⁰

Suspension of transactions by a discerning child

If the child is mindful and discerning, then the Ḥanafīs and Ḥanbalīs ruled that his transactions are valid, but suspended pending approval of his guardian as long as he is a child, or his own approval when he reaches legal age.

2.3 Conditions for the validity of a sale

Conditions for the validity of a sale may be divided into general and specific sets of conditions.⁵¹

⁵⁰Ibn 'Ābidīn ((Hanafī), vol.2, p.448), *Al-'Ahwāl Al-Shakhsiyya* by the late Dr. Muṣṭafā Al-Sibā'ī (vol.1, p.95).

⁵¹See the details in 'Ibn 'Ābidīn ((Hanafī), vol.4, p.6), *'Aqd Al-Bay'* for Professor Al-Zarqā' (p.25 thereon), *Al-'Amwāl wa Naẓariyyat Al-'Aqd* by Dr. Muḥammad Yūsuf Mūsā (p.394 onwards).

General conditions

Those are the conditions that must be satisfied for all types of sale contracts to make them legally valid. Those general conditions specify that the sale must not include any of the following six shortcomings: uncertainty or ignorance (*al-jahāla*), coercion, time-restriction, uncertain specification (*gharar al-wasf*), harm (*al-darar*), and corrupting conditions (*al-shurūt al-mufsida*).

1. Ignorance: This shortcoming signifies excessive uncertainty or ignorance that may lead to disputes that are impossible to resolve, since both parties would have equally valid arguments based on ignorance. An example of such a shortcoming is when a person sells one sheep out of a herd. This kind of ignorance may be divided into four types:

- (a) Ignorance by the buyer of the object of the sale: its genus, type, or quantity.
- (b) Ignorance of the price. Thus, it is not valid to sell something at a price specified to be the price of a similar object, or whatever future price may be determined in the market.
- (c) Ignorance of the time-period terms, as in deferred price or conditional options (*khiyār al-shart*), where the time-periods must be known, otherwise the contract is deemed defective. If the price and object are both fungible, the price may be deferred to a known date. However, if either the price or the object of the sale are non-fungible and identified, the scholars have agreed that the price may not be deferred. Thus, if a person sells a specific item to deliver it after one month, or if a person buys an item using a unique object as its price with the understanding that he will deliver the price in one month, then the sale is not valid, even if the term till delivery is known. This follows from the fact that deferment was legalized to enable the parties to the contract to obtain the property required to compensate the other party. This applies to fungibles since they are not specific items identified in the sale. However, specified non-fungibles are by their nature defined and present, and thus deferment would lead to damages without a corresponding benefit.⁵²
- (d) Ignorance of the means of documentation: This type of ignorance would ensue if the buyer makes it a condition to have a third party guarantor of the transaction, or pawning an object of the same value as the deferred price. In this case, the guarantor of the object to be pawned must be specified, otherwise the sale is not valid.

2. Coercion: We consider two types of coercion in sale:

⁵²Ibn Al-Humām ((Hanafi), vol.5, p.219), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'i), vol.9, p.373), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.155).

- (a) Total coercion: this is the situation where the coerced person finds himself forced to take an action; e.g. if he is threatened by death or permanent physical disability.
- (b) Partial coercion: this would result if the person is threatened with incarceration, beating, or injustice such as prevention from promotion or immediate demotion.

Both types of coercion affect the sale, rendering it invalid for most Hanafis, and suspended for Zufar. In this case, the buyer owns the object of sale after delivery of the price if the sale is invalid. However, the buyer does not unconditionally own the object of sale when the price is delivered if the sale is considered suspended. The better opinion is considering the coerced sale suspended, since the Hanafi scholars have agreed that if the coerced person approves the sale after the coercion is removed, it becomes valid and executable. This is the ruling for the suspended – and not the invalid – sale.⁵³

3. **Timing:** A sale is defective if it has an expiration period, as in saying: “I sold you this dress for one month”. In this case, the sale is invalid, since ownership of a specific object does not have an expiration date.
 4. **Deception and *gharar*:** If a person sells a cow with the understanding that it produces a certain amount of milk per day. This description of the object of sale is only assumed to materialize, and the actual amount of milk the cow produces may be less. However, if the cow is sold with the understanding that it produces milk but without quantifying its production, the specification is deemed valid.
- Uncertainty regarding the existence of the object of sale (*gharar al-wujūd*) invalidates the sale due to the Prophet’s (pbuh) prohibition of selling what may and may not exist (*bay’ al-gharar*);⁵⁴ e.g. selling the offspring of the offspring.
5. **Harmful sales:** This type of characteristic ensues if the object of sale cannot be delivered without causing the seller losses that exceed what he is selling. For example, if he sells a specific beam in the roof of a building, or a sleeve of a dress, then the delivery of the object of sale would require destroying the house or the dress.

Since the corrupting factor in this type of sale negatively affects only the personal rights of the seller (and not the legal rights), scholars have determined that if the seller completes the delivery that harms himself (e.g. by extracting the beam or cutting the sleeve), the sale becomes valid.

⁵³ Al-Kāsānī ((Hanafi), vol.7, p.188), *Al-Madkhal Al-Fiqhī* by Professor Al-Zarqā’ (vol.1, p.364), and 'Ibn 'Ābidīn ((Hanafi)).

⁵⁴ Narrated by Muslim, 'Ahmad, and 'Aṣḥāb Al-Sunan Al-'Arba'a on the authority of 'Abū Hurayra (mAbph) (see 'Ibn Al-'Athīr Al-Jazārī (, vol.1, p.441), Al-Haythamī (, vol.4, p.80).

6. Corrupting condition: Any condition that causes benefit to a party of the contract is corrupting unless it has been specified in the law, accepted in custom and convention, required by the contract, or suitable for the transaction. Examples of corrupting conditions are: if a person sells a car with the condition that he can use it a month after the sale, or a house on the condition that he can reside in it for some period; or if the buyer stipulates in the contract itself that the seller must lend him some amount of money.

If a corrupting condition is made part of a commutative contract (*‘uqūd al-mu‘āwadāt*, such as sale, lease, etc.), it invalidates the contract. In other types of contracts (e.g. donations, marriage, etc.), such conditions are deemed nugatory, and these contracts themselves are considered valid.⁵⁵

Professor Muṣṭafā Al-Zarqā’ has commented on this topic saying: “Since conventions among people validate conditions in the opinion of some scholars, every condition that is originally defective becomes valid and binding if people make it a convention and use it often. Thus, we can say that the corrupting condition has been juristically eliminated in people’s dealings with the passage of time, and this age’s conditions have all become valid by the very fundamentals of Ḥanafī inference (*‘ijtihād*).”⁵⁶

Specific conditions

Those are the conditions relating to some sales and not to others, as detailed below:

1. **Receipt of movable (*manqūl*) goods:**⁵⁷ It is a condition for the validity of selling a movable good purchased from another that the seller receives it from the first seller prior to concluding the second sale. This ruling follows from the high rate of depreciation of movable goods, and thus the second sale before receiving the goods would incorporate prohibited uncertainty (*gharar*). However, ’Abū Ḥanīfa and ’Abū Yūsuf allowed the sale of immovable properties (*‘aqār*) prior to receipt, as discussed below.
2. **Knowing the initial price in trust sales (*buyūc al-’amāna*):** This type of sales includes cost-plus (*murābaha*), investiture (*tawliya*), resale with loss (*wadīc a*), and joint purchase (*’ishrāk*), as detailed below.
3. **Exchanging object and price prior to parting in money exchange transactions (*ṣarf*).**
4. **Satisfaction of forward sale (*salam*)** conditions as detailed below, if that is the nature of the sale.
5. **Equality of compensations** if the object of sale lends itself to usurious uses (*ribawiyya*), and avoiding the semblance of *ribā*.

⁵⁵ *Al-’Amwāl wa Nażariyyat Al-‘Aqd* by Professor Muḥammad Yūsuf Mūsā (p.423).

⁵⁶ *c. Aqd Al-Bayc* (p.28).

⁵⁷ Here we use “movable” for *manqūl* and “immovable property” for *‘aqār*.

6. **Receipt of debts on the parties**, such as the object or price of forward sale, or selling an object in exchange for a debt on someone other than the seller. All of those debts may not be sold by anyone other than the debtor before receiving them. For example: the buyer in a forward sale may not sell the object of sale before receiving it from the seller. Also, the creditor may not buy an item from a party other than the debtor, with the price being the unpaid debt.

2.4 Conditions for bindingness (*luzūm*)

The conditions for a sale to be binding come into consideration after the conditions of conclusion and executability. Thus, for a sale to be binding, the contract must be devoid of all options that allow one of its parties to void the contract (e.g. options by condition (*khiyār Al-shart*), description (*waṣf*), price payment (*naqd*), identification (*ta‘yīn*), inspection (*ru‘ya*), defect (*‘ayb*), or deception (*ghubn ma‘a al-taghrīr*). If any of those options are present in the sale contract, it is not binding on the party who has the option right. This party may void the sale or accept it, unless the considerations discussed in the chapters dealing with options (*al-khiyārāt*) apply.⁵⁸

Note that the opposite of conclusion of a contract is its voiding; the opposite of its validity is its invalidity (*butlān*) or its defectiveness (*fasād*); the opposite of its executability is its suspension; and the opposite of its binding is non-binding, implying the existence of an option.

2.5 Summary of sale conditions

This section summarizes the different types of conditions of sale in different juristic schools (*madhāhib*), and highlights the points of agreement and disagreement among the various schools. Jurists enumerated different types of conditions of sales: the Hanafis enumerated twenty-three conditions, the Malikis enumerated eleven conditions, the Shāfi‘is enumerated twenty two conditions, and the Hanbalīs enumerated eleven conditions.

2.5.1 Conditions of sale for the Hanafis

The Hanafis classified the conditions of sale into four groups: (i) conditions of conclusion, (ii) conditions of validity, (iii) conditions of executability, and (iv) conditions of bindingness, with a total of twenty three conditions.⁵⁹

(i) Conditions of conclusion

Conditions of conclusion fall in four categories:

⁵⁸Ibn ‘Abidīn ((Hanafi), vol.5, p.6), *‘Aqd Al-Bay‘* by Professor Al-Zarqā’ (p.32).

⁵⁹Al-Kāsānī ((Hanafi), vol.5, pp.135–148,155).

1. Conditions pertaining to the parties of the contract. The buyer and the seller must both satisfy two conditions:

- (a) **Sanity and discernment:** The sales and purchases of an insane person, and those of a young non-discerning child, are not concluded.
- (b) **Multiplicity:** A sale may not be concluded by one person, but the offer must come from one party, and the acceptance from another. The exceptions to this rule are the father and his plenipotentiary, the judge, and a messenger of both sides; in which cases one party may be both buyer and seller.

2. Conditions pertaining to the language of the contract, consisting of the offer and acceptance. There are three such conditions:

- (a) **Audibility:** The sale is not concluded unless both parties heard the utterances of the other.
- (b) **Correspondence of the offer and acceptance:** The buyer must accept all the merchandise specified, and at the price indicated, in the offer. If the offer and acceptance do not correspond to one another, the sale is not concluded, unless the non-correspondence benefits the other party, e.g. if the buyer accepts to buy at a price higher than that indicated in the offer to sell.
- (c) **Unity of the contract session:** The offer and acceptance must be uttered in one session without break. If the session is altered, one of the parties departs, or one of the parties gets occupied by another matter before acceptance, then the sale is not concluded. The definition of a unified session is to be determined based on convention and the nature of the contract. However, immediate acceptance is not necessary, since the accepting party may need time to consider the offer.

In case the contract is conducted by any kind of mail, the session in which the message of the first party arrives to the second party is considered the session of the contract.

3. Conditions pertaining to the object of the contract: There are five such conditions:

- (a) **That the object of sale is a good:** This limits the object of sale to things that can commonly be used to benefit people, so the sale of a dead animal (*mayta*), or an insignificant amount of a good such as one grain of wheat, is not concluded.
- (b) **That it is admissible:** In other words only objects from which it is legal to derive benefit may be sold. Thus, the sale of wine and pork may not be concluded since their use is prohibited. This and the above condition were combined before into one.

- (c) **That it is private property:** Thus, the sale of what is not owned by any person, such as grass for public grazing is not permissible, even if it is on privately owned land.
 - (d) **That it exists at the time of the contract:** Thus, the sale of non-existent objects such as the produce of the produce may not be concluded. Also, the sale of items that may exist and may vanish (e.g. a lamb in the womb or milk in an udder) may not be concluded.
 - (e) **That it be possible to deliver the object of sale at the time of the contract:** Thus, the sale of fish in the water and birds in the sky may not be concluded.
4. **The condition of compensation or price:** The price must be an existing legitimate privately owned item. Thus, the price of a sale may not be wine or pork.

(ii) Conditions of validity

Those are subdivided into general and specific conditions.

The **general conditions** pertain to all types of sale and subsume all the conditions of conclusion mentioned above, since a contract that may not be concluded may not be valid either. In addition, there are four other conditions of validity:

1. **That the object of sale and the price are known beyond dispute:** Thus, it is not valid to sell an unknown such as one sheep in a herd, or to sell with an unknown or unidentified price such as selling an item for its value, or for what is described only as what is in one's hand or pocket without it being known to the seller.
2. **That the sale is not timed:** The essence of sale is the eternal exchange of property rights to the object of sale and the price.
3. **That the sale is beneficial:** Thus the sale of one unit of currency for another equal in value is not valid.
4. **That it does not contain a corrupting condition:** Corrupting conditions are those that lead to an extra benefit to one of the parties of the contract. They are forbidden since such benefit is not legally proscribed, not accepted conventionally, and not appropriate to the nature contracts. Thus, it is not valid to stipulate a condition that the sold animal be pregnant, that the object sold be used by the seller for a period after the sale, or that the buyer lends the seller an amount of money.

As for the **particular conditions** that apply to some sales and not others, there are five:

1. **Receipt of movable or immovable but perishable goods before sale:** Thus, if a person buys an item, it is not valid for him to sell it

to another before receiving it, since that would violate the prohibition of selling what he has not yet received. However, for an immovable object that is not perishable, selling it before having it in the seller's possession is valid for 'Abū Ḥanīfa and 'Abū Yūsuf.

2. **That the initial price be known in trust sales:** Those types of sales include cost-plus, investiture, and resale with loss.
3. **Equality of the exchanged items if they are of the same genus** and were measured by weight or volume. This is a condition for all commodities that can give rise to *ribā*.
4. **The satisfaction of the conditions of forward sale** when conducting this type of sale. For example, the entire price of the sale must be paid during the sale session.
5. **That neither of the exchanged items is a debt** when the debt is being sold to a party other than the debtor.

(iii) Conditions of executability

There are two conditions of executability:

1. **That the object of sale is owned or under the authority of the seller:** Thus, the sale of an item not owned by the seller (either sale of what is owned by another, or sale of an uncommissioned agent) is not executable, except in the forward sale, since it is valid to sell what he will own after the contract is concluded.
2. **That none other than the seller have a right in the object of sale:** Thus, the sale of a pawned or rented item is not executable, since others have a right in the item that is owned by the seller.

(iv) Conditions of bindingness

There is only one condition for the contract to be binding on its parties, and that is not having any options. Thus, a sale contract that allows for options is not binding, and may be voided.

2.5.2 Conditions of sale for the Mālikīs

The Mālikī conditions are divided into three groups pertaining to the parties to the contract, the language of the contract, and the object of the contract, for a total of eleven conditions.⁶⁰

The conditions pertaining to the buyer and seller are three, with a fourth for the seller alone:

⁶⁰:Ibn Juzayy ((Mālikī), p.245 onwards), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, pp.125-127,168-171).

1. **That the buyer and seller are both discerning:** Thus, the sale of a non-discerning child, an insane person, an unconscious person, and an intoxicated person, all may not be concluded. However, the sale of a discerning person is not necessarily binding regardless of validity; unless the discerning child is a legal agent of a legally responsible person, in which case it is binding.
2. **That the buyer and seller are both owners, legal agents of owners, or guardians of owners:** Thus, the sale of an uncommissioned agent is concluded, and suspended conditional on the approval of the owner.
3. **That they are free to choose:** Thus, the sale and purchase of a coerced person are void. The authoritative opinion among the Mālikīs is that the sale of coerced person is not binding.
4. **That the seller is discerning and of legal age:** Thus, the sale of an incompetent person, or a person under the supervision of a guardian, are not executable, and they are suspended conditional on the approval of the guardian.

It is not necessary for the parties to the contract to be Muslims, except for the buyer of a Muslim slave, or the buyer of a copy of the Qur'ān (i.e. a *Mushaf*). In those cases, the sale is valid and executable. However, the non-Muslim buyer is forced to give up his ownership of that item, since that is demeaning for Islam. Also, the sale and purchase by a blind person is allowed, thus eye-sight is not a condition for sale.

As for the conditions **pertaining to the language of the contract**, they are:

1. **Unity of the contract session:** Thus, the offer and acceptance must take place in the same session; i.e. if a seller tells a [potential] buyer: "I sold you this book for so much", and the buyer did not answer him before they parted from the session, the sale is not concluded.
2. **The offer and acceptance must not be separated by anything that conventionally indicates rejection of the sale.** If something occurs between the offer and acceptance that is conventionally associated with rejection, the contract is not concluded.

As for the conditions **pertaining to the price and object of sale**, they are:

1. **That they are not legally prohibited:** Thus, the sale of a dead animal, blood, or an item that is not yet in the possession of the seller, are not concluded.
2. **That they are pure:** Thus, the sale of impure items such as wine or pork is invalid. Also, it is conventionally agreed that the sale of ivory,

garbage, and impure oil are generally prohibited. However, 'Ibn Wahb allowed such sales. Thus, the scholars who consider the ivory obtained from an elephant to be a tooth, consider it a part of the dead animal, and thus forbidden; while those who consider it an inverted horn find it admissible.

3. **That it can be used in a legally beneficial manner:** Thus, it is not allowed to sell dogs, insects, and gambling machines. However, the Mālikīs have different opinions over the sale of dogs for use in hunting and the protection of sheep.
4. **That it be known to the parties of the contract:** Thus, the sale of an unknown is not allowed.
5. **That it be possible to deliver:** Thus, the sale of what is not possible to deliver, such as fish in a sea, ocean, or river, is not concluded.

2.5.3 Conditions of sale for the Shāfi'īs

The Shāfi'īs have stipulated twenty two conditions pertaining to the parties of the contract, its language, or its object.⁶¹

There are four conditions pertaining to the buyer and seller:

1. **Eligibility (*al-rushd*),** which constitutes being discerning, of legal age, and actively protective of their religious and financial well-being. Thus, the sale of a young boy is not concluded (even if intended to test his judgment), and neither is the sale of an insane person, or one under supervision due to his incompetence concluded. However, if a boy conducts a sale and destroys an item that he bought or borrowed from an eligible person, then the apparent ruling is that he is not responsible for the destroyed item, since the one who gave him control over that item is considered the one who wasted his own property. However, the more sophisticated and less apparent ruling is that the underage child is responsible for compensating the other party to that contract after he reaches legal age, as stated by Al-Shāfi'ī in *Al-'Umm*, chapter of confirmation (*Al-'Iqrār*). In case the boy receives items sold to him by another boy, without the permission of their guardians, then each of them is responsible for what he received from the other. However, if the exchange took place with the permission of the guardians, then the guardians are the ones who are responsible for the items.

The person who sells to a boy is responsible to return the price to his guardian. Thus, if he returns it to the child (even with the permission of the guardian), then he is still responsible for what may happen to the item. However, if he returns it to the guardian, then he has relieved himself of all responsibility. Exceptions to this rule exist in case the sold item was

⁶¹ Al-Khatib Al-Shirbīnī ((Shāfi'ī), vol.2, pp.5-16), Al-Sharqāwī ((Shāfi'ī), pp.141-145).

for the physical benefit of the child, such as food and drink, in which case he is relieved of responsibility.

2. **No wrongful coercion:** Thus, the contract by one who is wrongfully coerced is not valid, according to the verse [4:29]. Whatever an unrightfully coerced person says has no legal effect, except in prayers, where it violates and voids it. Also, the actions of such a person have no legal effect except in breastfeeding, the voiding of ablutions, turning away from the *qibla*, not performing a religious obligation while able to do so, and murder.

As for **rightful coercion**, approval of the law supersedes and replaces approval of the party to the contract. For example, if a person is indebted and refuses to pay his debts or sell some items to do so, then the judge may sell some of his property without his permission to repay his debts. Alternatively, the judge may rebuke or imprison him to force him to sell such an item and repay his debts.

3. **That the person purchasing a *Mushaf* or other Islamic texts be a Muslim:** This includes books of *Hadīth*, of Islamic traditions and sayings, or of Islamic Jurisprudence that contain elements of the Qur'ān, *Hadīth*, or tradition, since this is demeaning for Islam. The sales of such items to an infidel is not valid. Similarly, the best opinion is that the purchase of a Muslim slave by an infidel is not valid, since it humiliates a Muslim, and is in defiance of the verse "And never will Allāh grant to the unbelievers a way (to triumph) over the believers" [4:141].
4. **That the buyer does not belong to an army purchasing weapons that may be used against Muslims.** However, items other than weapons, even if made of steal, may be sold to armies since they can be used for other purposes. A Christian or Jew in the land of war is considered equivalent to a member of an army.

As for the thirteen conditions **pertaining to the language**, they are:

1. **Direct communication:** In other words one of the parties to the contract must address the other, as in saying "I sold you such and such". Thus, if he says "I sold to so-and-so", it is not valid.
2. **Addressing the entire person:** Thus, the seller may say: "I sold to you", however, if he says "I sold to your hand, or I sold to your head", it is not valid.
3. **That the acceptor is the one who was addressed:** Thus if an offer is made to one person, and a different person who is not his legal agent accepts on his behalf, the sale is not valid. If the person who was addressed died before accepting, and his heir accepted, the sale is not concluded. The same applies to his legal agent accepting after his death.

4. **That the first speaker specifies the price and object of sale:** for example, he may say: “I sold you this for so-much”, or “I bought this from you for so-much”.
5. **That the buyer and seller mean what they say:** Thus, if someone utters the language of offer or acceptance without meaning to exchange ownership with the addressed person (e.g. as a joke), the sale is not valid.
6. **That the speaker making the offer does not withdraw it before acceptance,** and that the eligibility of the two parties is maintained until acceptance. Hence, if he says: “I sold you...” then he becomes insane or faints before the other accepts, the contract is voided. If the offer is made with an implicit deferment or option to choose, then the deferment or the option were dropped, the contract is not valid, since the offer by itself is weaker in both cases.
7. **That the period between offer and acceptance is not too long:** A long period between the offer and acceptance is defined as one that indicates disinterest in the offer.
8. **That no discussion outside the contract intervenes between the offer and acceptance,** even if the buyer and seller do not part from the session, since such a foreign discussion is indicative of disinterest in the offer. Exceptions are a short period of silence, and a minimal foreign discussion during a *khul'* contract (divorce at the instance of the wife with monetary compensation), since it allows the husband to comment, and the wife to assert her opinion, unlike the case of a sales contract.
9. **That the person making the offer does not alter it before the acceptance.** For instance, if the seller says: “I sold you for five”, then says: “for ten” before the other accepts, the contract is not concluded.
10. **That the language of the contract be audible:** Thus, both parties to the contract, and every person in their proximity, must hear what they are saying. If those present in the proximity of the parties do not hear the language, the contract is not concluded.
11. **That the offer and acceptance agree completely,** otherwise, the contract is not valid.
12. **That language of the offer does not imply conditionality outside of the contract:** For example, if the seller says: “if so-and-so comes, I have sold you such-and-such”, or “I have sold you this house if so-and-so wishes, or if Allāh wishes”, since a sale requires assertiveness. However, if the offer is conditional on something related to the contract, such as saying: “I have sold you this for so-much if you wish”, then if the buyer says: “I have bought”, then the contract is valid, since this conditionality does not negate the contract, but is rather an explicit statement of something essential for the contract.

- 13. That the contract does not have an expiration period:** for instance, if the seller says: "I sold you this house for a month for one thousand", the contract is not valid, since a sale must be unlimited in time.

As for the five conditions pertaining to the object of the contract, they are:

- 1. That the object of the contract is pure:** Thus, the sale of dogs, wine, and an adulterated items that cannot be purified such as vinegar, milk, and animal fat, is not valid.
- 2. That it is legally beneficial:** Thus, the sale of insects that have no use is not valid. The same applies to the sale of animals and birds that have no legal uses such as lions, wolves, and vultures. Also, it is not valid to sell instruments of entertainment, or statues or pictures. Moreover, the sale of two grains of wheat (or any very small quantity) is not valid since it is insignificant. However, it is valid to sell water entrapped at the shore, rocks by a mountain, and dust in the desert by their owner, since they are beneficial.
- 3. That the object be possible to deliver:** Thus, it is not valid to sell birds in the sky, fish in a sea, ocean, or river, a run-away slave, or a lost or stolen animal. However, if the stolen animal is sold to one who is capable of extracting it from the thief, or a lost animal is sold to one who is capable of finding it, then it is valid, unless this buyer needs additional supplies to do so in which case it is not valid.
- 4. That the party to the contract be the object's owner, or a guardian for the owner:** Thus, the sale of the uncommissioned agent is invalid, due to the saying of the Prophet (pbuh): "There is no sale but for what you own".⁶²
- 5. That the object be known to the parties to the contract, in genus, amount, and description:** Thus, the sale of one of two dresses for instance is invalid due to corrupting uncertainty. However, the sale of one measure out of a heap of foodstuffs is valid since its parts are homogeneous, and ignorance of the exact items being sold is immaterial in this case. On the other hand, the sale of one item from a heterogeneous group (e.g. a herd of sheep) is not valid.

2.5.4 Conditions of sale for the Ḥanbalīs

The Ḥanbalīs have stipulated eleven conditions for the sale contract pertaining to the parties of the contract, its language, or its object.⁶³

The two conditions pertaining to the parties to the contract are:

⁶²Narrated by 'Abū Dāwūd and Al-Tirmidhī who said that it is a *Hadīth hasan*.

⁶³Marqī ibn Yūsuf (1st printing (Hanbalī), vol.2, pp.5-14), Al-Buhūtī (3rd printing (Hanbalī), vol.3, pp.139-166).

1. A sufficient degree of discernment: Thus, sale by a young boy, an insane person, an intoxicated person, or an incompetent person is invalid; with the exception of cases where the guardian of a discerning child or incompetent person permits a beneficial sale, in which case the contract is valid. However, if the sale is not beneficial, it is forbidden for the guardian to give a permission to conclude the sale, since it would be wasteful.

It is invalid for a discerning child or an incompetent person to give a gift, write a will, sell property, etc. unless their guardian approves the contract.

In minor matters, the dealings of a young child (even if below the age of discernment) would be valid, as narrated that “Abū Al-Dardā’ bought a sparrow from a small child and set it free”.⁶⁴ Similarly, minor dealings of an incompetent person, such as a small container of foodstuffs or matches, etc. are permitted, since the justification of limiting their dealings is fear of wasting property, which is not applicable to minor dealings.

It is valid to commission a discerning child as a legal agent in sending a gift or entering a house, in accordance with convention.

2. Mutual agreement of the buyer and seller of their own free will, or under rightful coercion. This is due to the verse [4:29], and the *Hadīth* “Trade is based on mutual agreement”.⁶⁵ Thus, the sale to preempt danger (*bay’ al-talji’ā*, or *bay’ al-’amāna*), where the parties to the contract pretend to conduct a sale that they do not intend, is not valid. Also, the sale of someone who is joking about the sale is not valid, since his true intention is not to conduct a sale.

The sale is valid in the case of rightful coercion, such as the case of a ruler coercing a person to sell some property in order to repay his debts, or to buy what would satisfy his debts. Examples of a rightfully coerced person include someone who has pawned some property, a monopolist, and a debtor.

It is detestable to buy the property of a compelled person who sells his property for less than its market value.

There are three conditions pertaining to the language of the contract:

1. **Unity of the trading session:** Thus, acceptance must be in the same session as the offer. So, if a seller says “I sold you”, and they parted before an acceptance in that session, the sale is not completed.
2. **That there is no separator between the offer and acceptance that conventionally indicates aversion to acceptance.**
3. **That the contract does not have an expiration date or a suspension clause other than Allāh’s will:** An example where this condition is violated would be saying: “I sold you for a year”, or “I sold [or bought] if so and so agrees”.

⁶⁴Narrated by ’Ibn ’abī Mūsā.

⁶⁵Narrated by ’Ibn Hibbān, with full reference provided above.

As for the six conditions pertaining to the price and object of the contract, they are:

1. **That the object of sale is an owned commodity**, i.e. something that is legitimate for use in all cases, not necessarily under necessity. A sale is an exchange of one property for another, thus the sale of what may not be used (such as insects) is not valid, and neither is the sale of items whose use and benefits is prohibited such as wine, the sale of what may be used only as needed such as a dog, and what may only be used in cases of extreme necessity such as the meat of dead animals [at times of famine] or wine when choking with food in the throat.

It is valid to sell the skin of a dead animal after staining it, and possessing it is valid even if not a necessity. Also, it is valid to sell a mule, a donkey, silk worms, or bees individually if it is possible, or with the entire beehive if seen entering it, since it is beneficial for people. It is also valid to sell birds used for hunting, worms for catching fish, animals and birds of prey used for hunting only, and it is permitted to sell leeches to sucking blood (for medical purposes).

It is also valid to sell birds to hear their voices (e.g. robins and nightingales) since that is a permissible benefit. Also, it is permitted to sell parrots and similar birds. It is also permissible to give an ownerless dog as a gift.

It is not valid to sell deadly poisons (e.g. from snakes), since they have no beneficial use. The same applies to poisons extracted from various plants, unless they can be used in small quantities for medicinal benefit.

It is forbidden to sell a written Qur'ān (i.e. a *Mushaf*) to a Muslim or infidel, since honoring it is obligatory, and selling it is a denigration of its value. Moreover, since an infidel may not own a *Mushaf* in the long term, such a possession is invalid from its very beginning.

It is not valid to sell instruments of entertainment such as horns, drums, dice, and chess-sets. It is not valid to sell insects such as beetles, mice, snakes, scorpions, cockroaches, etc. It is not valid to sell a dead animal even for one who needs the money, nor is it valid to sell blood, pork, or idols.

It is not valid to sell impure manure, or fats from impure sources (e.g. from a dead animal, etc.), due to the *Hadīth* reported in Al-Bukhārī and Muslim: "When Allāh forbids an item, He forbids its price". It is forbidden to use such impure fats in any way (e.g. lighting, etc.) since it was forbidden by the Prophet (pbuh) in an agreed-upon *Hadīth* narrated by Jābir. It is not permitted to sell polluted fats (e.g. oils that were contaminated with impure substances) even to a non-believer, due to the above mentioned *Hadīth* that forbids its price. However, it is valid to use impure fats for lighting in places other than mosques, since that leads to benefit without any harm.

It is not permitted to sell a free human being, due to the *Hadīth* reported by Al-Bukhārī and Muslim: “I am the adversary of three on the day of judgment; and among them is: any man who sold a free person and consumed the price”. It is not permitted to sell public properties such as pasture, water or minerals prior to being possessed and owned by anyone, due to its violation of the following condition:

2. **That the object of sale is completely owned by its seller** since the Prophet (pbuh) said to Ḥakīm ibn Ḥizām: “Do not sell what you do not possess”.⁶⁶ Thus, the trading of an uncommissioned agent is not valid, even if permission is obtained afterwards.

It is not valid to sell what is not owned such as a free person or a public property before obtaining possession, or the sale of lands held in trust and not distributed. However, a religious leader may sell such trust land for benefit. Those who considered such a sale valid also allowed individuals other than religious leaders to perform such sales. It is not valid to sell or lease the Holy Mosque in Makkah or the homes surrounding it. The same applies to the areas where hajj rituals are performed, since those, like mosques, are for the benefit of all Muslims. It is not valid to sell what is no completely owned such as an item the ownership of which is still suspended by an option.

3. **That the item is deliverable at the time of the contract**, since that which is not deliverable is comparable to that which does not exist, and the sale of the latter is not valid.

Thus, it is not valid to sell half of a specific object such as a pot, a sword, or an animal. Also, it is not valid to sell a debt to anyone other than the debtor. It is not valid to sell a run-away slave or lost animal to someone capable of bringing them back, due to the *Hadīth*: “The Prophet (pbuh) has forbidden the purchase of a run-away slave”.⁶⁷ It is not valid to sell fish in water, unless it is encased in an area that facilitates catching it. It is not valid to sell birds that are difficult to catch, or if it is flying and accustomed to return, unless it is in a closed area, since otherwise it is not known to be deliverable.

The sale of an object obtained by coercion is only valid to the one who obtained it thus, or to a person who can obtain it from him. In the latter case, the person has the option to void the contract if he fails to obtain the object.

4. **That the object of sale be known to the buyer and seller via inspection** at the time of the contract or at an earlier time such that the object certainly would not change.

It is valid for a blind person to buy and sell what he may inspect without eyesight (i.e. by using his other senses such as touch, smell and taste).

⁶⁶Narrated by 'Ibn Mājah and Al-Tirmidhī, who considered it a *Hadīth saḥīh*.

⁶⁷Narrated by 'Aḥmad on the authority of 'Abū Sa'īd.

It is valid to sell an unidentified measure out of a large quantity of a homogeneous good.

It is not valid to sell based on a sample (such as showing the buyer one measure of a good, and selling a much larger uninspected quantity claiming to be of the same material), since the object of sale is not inspected at the time of the sale.

It is not valid to sell an unborn animal in the womb, milk in an udder, seeds in fruits, or wool on an animal, except as part of a sale of the whole, such as: “I sold you this animal and what it carries”, or “I sold you this land and the seeds in it”.

It is not valid to sell the offspring of the offspring of an animal, what a tree or animal carries, perfume in its container, onions or turnips before extracting them, a folded cloth, or a cloth the weaving of which has not been completed. All of those items, as described, are not inspected prior to the sale.

It is not valid to sell based on touch as: “I have sold you this dress when you touch it”, “if you touch it”, or “I have sold you whichever dress you touch”, for such-and-such a price. Similarly, the sale of discarded items is not valid. For example, if a seller says: “whenever (or if) I discard this item, then its yours for so-much”, or “whichever dress I discard is sold to you for so much”. “Sale of the pebble” (*bay’ al-hasāt*), where the person throws a pebble, and whichever item it falls on is sold to them at a pre-specified price, is not valid.

Also, the sale of an unknown (*bay’ al-majhūl*) without identifying the specific item out of a group (e.g. selling one sheep out of a herd, or one tree out of a garden) even if all the members of the group are of equal value.

5. **That the price be known to both parties at the time of the contract or before:** Thus, it is not valid to sell at an unknown numerical price, or “at the same price for which so-and-so sold”, unless the latter is known to both parties. It is not valid to sell “at the same price at which people trade”, or at the price on which we agree later (in disagreement with the view of later Ḥanbalīs).
6. **That the price, object of sale, and parties to the contract do not have any invalidating aspects** such as usury (*ribā*), invalidating conditions, etc. Thus, it is not valid to sell an animal designated for an obligatory religious sacrifice (at ḥajj or elsewhere) except for better animals. Also, it is not valid to sell mortmain property without compelling reason, sell a pawned item without permission of the pawn-broker, sell water or appropriate clothing to a person embarking on prayer and lacking those items, sell a *Muṣṭaf*, or selling after the call for the Friday noon (*jum’ah*) prayer has been made.

2.5.5 Agreements and differences in sale conditions

In the discussions above, we notice the following:

1. **For the parties to the contract:** Discernment is an agreed-upon condition. However, there are disagreements regarding the condition of reaching legal age: it is a condition of executability for the Mālikīs and Ḥanafīs, and a condition of conclusion for the Shāfi‘īs and Ḥanbalīs.

As for acting of their own free will, it is a condition of conclusion for the majority of scholars, and a condition of executability for the Ḥanafīs. Thus, coerced sale is void for the majority of scholars, while it is suspended and not executable for the Ḥanafīs, and non-binding for the mainstream Mālikī position.

2. **For the language of the contract:** The following are all agreed-upon conditions for all the *madhāhib*, even if some of the *fuqahā’* omit mentioning some of them: unity of the session without a separation between the offer and acceptance, the full correspondence of acceptance to offer, that the language be audible and that the contract is not suspended, and that the sale does not have an expiration period.

3. **For the object of the contract:** The following are agreed upon by the scholars: that the object of sale be an owned property that can be used legitimately, that it is pure, existent, possible to deliver, and fully known (i.e. without ignorance). Ignorance voids the contract for the majority of the scholars, but only renders it defective for the Ḥanafīs. The condition that the object be owned by the seller is a condition of executability for the Ḥanafīs and Mālikīs, and a condition of conclusion for the Shāfi‘īs and Ḥanbalīs. Thus, the sale and purchase of an uncommissioned agent is suspended for the Ḥanafīs and Mālikīs, and void for the Shāfi‘īs and Ḥanbalīs.

As for the condition that no person other than the seller have any right to the object of sale (as in the sale of a pawned or rented item), it is a condition of executability for the Ḥanafīs and Mālikīs, and a condition of conclusion for the Shāfi‘īs and Ḥanbalīs. Thus, the sale of a pawned or rented item is suspended for the first two schools, and void for the second two.

Chapter 3

Status, Object, and Price

This chapter consists of two sections:

1. Status of the contract.
2. A discussion of the object of sale and the price.

3.1 Status of the contract

The status of a contract is its purpose. Thus, the purpose of a sales contract is to transfer ownership of the object of the sale to the buyer and ownership of the price to the seller. In a lease contract, the purpose is the transfer of ownership of the usufruct of the leased item to the lessee, and the transfer of ownership of the rent to the lessor.¹

The Arabic word *hukm*² may refer to one of three things:

1. The legal status of the action, which is either: (i) obligatory, (ii) recommended, (iii) permitted, (iv) reprehensible, or (v) forbidden. Thus, we say that the status of fasting is “obligatory”, the status of theft is “forbidden”, etc.
2. The juristic characterization of the actions, such as their validity, bindingness, etc. Thus, it would be said of a contract that satisfies all its cornerstones and conditions that it is valid and binding.
3. The legal consequences resulting from a legal action; e.g. the consequences of a will that satisfies all of its cornerstones and conditions as they pertain to the heir and objects mentioned in the will.³

¹ *Al-'Amwāl wa Nazariyyat Al-'Aqd* by Professor Muḥammad Yūsuf Musā (p.372).

² translated here as “status”. [tr.]

³ *Al-Talwīḥ Sharḥ Al-Tawdīḥ* by Al-Taftāzānī (vol.2, p. 122), and *Al-'Ahwāl Al-Shakhsiyā* by Professor Mustafā Al-Sibā'ī (vol.2, p. 114).

In this text, we use the term to refer to the third meaning of the term: the established legal status of the sales contract, and its consequences. Thus, the status of the sale is establishment of the buyer's ownership of the object, and the establishment of the seller's ownership of the price, if the sale is binding (i.e. void of options).⁴

What we mean by “the rights of a contract” (*huqūq al-^caqd*) are the actions necessary to reach its status; e.g. the delivery of the object of sale and receipt of the price, returning the object of the sale if a defect is found, options of inspection or other conditions, and the obligation to return the price if the object is rightfully returned.⁵

Rights attached to merchandise

Those include all the rights pertaining to the object of sale without which the object of sale would not have been desired; e.g. infrastructures such as roads, wells, or land. The general rule is thus: everything connected to a house is part of its sale, even if not mentioned explicitly. However, items that are not connected to the house are not part of the contract unless they are mentioned explicitly in the contract or conventionally understood to be part of selling a house. Thus, keys to the house would be conventionally considered part of the sale; as contrasted with a pad lock and its key, or detached ladder, that do not. However, stairs in multi-level buildings are conventionally and automatically part of the sale, as detailed below:⁶

1. If a person buys a house with another house on top of it, the other house is not part of the sale, since the like of an object does not belong to it.
2. The sale of a house includes its private rights and infrastructure such as roads, kitchens, bathrooms, etc., since they belong to the house. Thus, selling a house includes selling all internal corridors or roads leading to public roads, its out house, its water wells, the trees within its boundaries, and its connected gardens and yards, even if not explicitly mentioned in the contract. The main door of the house is included in the sale, as well as the main gate (or “greater door”) leading to the street, since those are both part of the house's infrastructure. However, a disconnected garden or yard that is equal or larger in size than the house itself, are not automatically included in the sale of a house.

However, a hut in front of the house, if built on the road, shares the status of the road. The road itself, and any areas for water and drainage access that are not privately designated to the house are not considered part of the house when sold, unless they are explicitly mentioned in the contract. This is contrasted with the case of a lease, pawn, or endowment contract, in which case all the infrastructures of the house are clearly part of its

⁴Al-Kāsānī ((Hanafi), vol.5, p.233).

⁵Al-'Amwāl wa Nazariyyat Al-^cAqd, op.cit.

⁶Khusrū (1304H (Hanafi), vol.4, pp.197-199).

usufruct and are part of the contract whether or not they are explicitly mentioned. This is the old opinion of the Ḥanafī school, and its strongest support is the convention in various places and periods.

The following are treated the same way as the sale contract: the concession of a house, reconciliation over one, listing one in a will, giving one as a gift, and marriage and divorce with financial compensation.

3.2 Price and object of sale

The discussion of the price and object of sale will proceed in two steps:

1. Specification of the price and object of sale.
2. Rulings related to the price and object of sale.

3.2.1 Specification of the price and object

For the majority of Ḥanafī scholars, the “object of sale” and “price” are antonymous expressions that denote many meanings. In the most common usage, the object of the sale becomes uniquely identified by specification, while the price is most often not uniquely identified by specification in a contract.⁷ The same applies to animals and foods whose characteristics and descriptions are related to their valid usage. Such objects become identifiably unique because they have different usage for different people.⁸

This is the general rule for those two items, but it can change under specific circumstances. For example, items that cannot be uniquely identified may become objects of sale, such as those in a forward sale, and items that can be uniquely identified can become a price such as the price in such a forward contract, if it is an uniquely identifiable object. Consequently, the most common practice is to consider the price to be a debt or liability (*dayn*), typically specified generically as a quantity of fungible goods such as money, wheat, oil, and other items that can be weighed or measured in volume, length, or number. The price may also be non-fungible, such as an animal, or specific clothes, etc. For instance, if a quantity of sugar is forward-sold for a non-fungible price, the object of sale is fungible, and the price is not.

Ibn Al-Humām and others ruled that clothes can be non-fungible objects of sale in forward contracts, and can also be considered a deferred liability if specified as a price. In the latter case, deferment is a condition, not due to its being a price, but rather to make it eligible for being a deferred debt of non-fungibles. Thus, it is valid to sell a book for a price of a described dress to be delivered in the future; thus the book is sold but the dress does not have to be delivered in the session. This is in contrast to delivering a monetary price

⁷ Al-Qarāfi said: There is a consensus among the people that the commodities (i.e. traded goods) become identifiably unique (*tata^cayyan*), once they are specified.

⁸ Al-Qarāfi ((Mālikī), vol.4, p.7).

for the purchase of a dress, in which case the dress becomes the object of the forward sale, since it cannot be sold before its delivery.⁹

Al-Shāfi‘ī and Zufar said that “object of sale” and “price” are synonyms, which may describe the same object, and the distinction between the two depends on which is designated by the preposition “for” in “I sold you ... for ...”.

Both parties have their own foundation for their opinion, and this is merely an issue of semantics.¹⁰

Specification of the object of sale

Specification (*al-ta^cyīn*) is the identification of a specific object to the exclusion of all others. The object of sale is specific if it is specified in the contract, whether it is present in the sale session or absent. If the object of sale is not specified in the contract, then it becomes specified only by its delivery.¹¹

Differences between price, value, and debt

- A price may only exist in the context of a contract. It is determined by the mutual agreement of the buyer and seller, whether it is more, less, or equal to the object’s value.
- The value of an object is its market value (market price).
- A debt is an obligation on a person, and must be of the genus of the (fungible) properties in which debts can be specified. A debt may come into being through agreement, coercion, bail or security deposit, borrowing, sales, etc.¹²

Differentiation between the price and object of sale

The general rule is that whatever can be an object of sale can be a price and vice versa. As discussed above, the price may be a non-fungible as well as a fungible, just like the object of sale.

Thus, we need to differentiate between the price and object of sale in a manner that facilitates analyzing their different rulings. Such distinction will apply to commodities used in exchange, which are money, as well as fungible and non-fungible commodities:

1. Money measured in gold, silver, or commonly accepted currencies,¹³ if it is compensation for the object of sale, is considered a price. The other component of a sales contract is the object of sale, whether it comes before

⁹ 'Ibn ^cĀbidīn ((Hanafi), vol.4, p.26).

¹⁰ Al-Kāsānī ((Hanafi), vol.5, p.233).

¹¹ See ^cAqd *Al-Bay^c* by Professor Al-Zarqā' (p.34).

¹² ^cAqd *Al-Bay^c* (p.56 onwards), 'Ibn ^cĀbidīn ((Hanafi), vol.4, pp.53,173).

¹³ Including both coins and paper currency.

or after the preposition “for”, as in “I sold you this item for one coin”, or “I sold you this coin for this item”.

The majority of Ḥanafī scholars have decided that minted coins in gold, silver, or other metals, are not made non-fungible by specification in exchange contracts. Thus, if a seller says: “I sold you this dress for those specific coins”, the buyer has the right to replace those coins with others of equal value, and the seller has no right to insist on getting the specific coins to which he pointed. This is inferred from monetary prices being specified as a liability, which cannot be identified by its specific external features. Instead, liabilities are specified in terms of non-fungibles that are described only in terms of their genus, type, characteristic, and quantity. Thus, if the description was 1000 coins of a specific currency in good condition, he only needs to use 1000 coins satisfying that description. Consequently, if the specific monies to which the seller pointed were destroyed, the contract is not voided.

On the other hand, the Shāfi‘is and Zufar ruled that monies can be made non-fungible by being specifically identified in a contract, in which case the seller has the right to get the specific monies to which he pointed, as any non-fungible would have been treated. They made this judgment since the person may have a specific purpose for those specific monies, and a specified price is treated no differently from a specified object of sale, in that the rights of the parties to the contract pertain to the specific items that they identify in the contract. Consequently, if the price to which the seller pointed is destroyed before delivery, the contract is void in the same manner it would have been voided if the object of sale were destroyed.

All agree that if the price is not a minted coin, then its specification in the contract makes it non-fungible.

2. If non-fungible commodities are traded in exchange for specific fungibles, they automatically become the object of sale, and the fungibles are automatically and generally the price regardless of how the two are mentioned in the language of the contract. This is the case since fungibles are more appropriate to be a price due to the possibility of rendering them a liability, in analogy to money.

Examples of non-fungibles are clothes, houses, buildings, and heterogeneous countable items such as sheep, animals, and watermelon if it is sold by number not weight.

However, if non-fungibles are traded in exchange for non-specified fungibles, then the one considered to be a price is the one following the preposition “for”. For example, if a seller says: “I sold you this item for one pound of sugar”, then the sugar is the price; but if he says: “I sold you a pound of sugar for this item”, then the sugar is the object of sale, and the item is the price, and in this case the contract is a forward sale.

3. Fungibles, if traded in exchange for money, are the object of sale as discussed above. If fungibles are traded in exchange for other fungibles, such as exchanging wheat for oil, then the one that is specified is the object of sale, and what is described as a liability is the price.

If both fungibles are described as liabilities, then the one following the preposition “for” is the price, and the other is the object of sale.

Fungibles are those measured by: (i) volume such as wheat and barley, or liquids such as petroleum oil that are measured by the liter; (ii) weight such as ghee, oil, or sugar, (iii) length or size such as cloth or land, or (iv) countables of approximately equal size and quality, such as eggs, nuts, glasses, plates, etc.¹⁴

4. If non-fungibles are exchanged for other non-fungibles, then each is considered a price on the one side and an object of sale on the other.

3.2.2 Rulings pertaining to object of sale and price

Following the distinctions between price and object of sale drawn above, a number of rulings ensue, of which I discuss six in summary and three in detail:

1. A condition for the conclusion of sale is that the object of sale be a valued good with legitimate uses. This condition does not apply to the price.
2. A condition for the executability of a sale is that the object of sale be in the possession of the seller. The same condition does not apply to the price.
3. It is not valid to defer the delivery of the price in forward sales, while the deferment of the object of sale is necessary.
4. The cost of delivery of the price is borne by the buyer, and the cost of delivery of the object of sale is borne by the seller.
5. A sale without naming the price is defective and invalid (*fāsid*); whereas not naming the object of sale, as in saying: “I sold you for ten coins”, voids the contract that is thus not concluded.
6. If the object of sale perishes after the exchange of object and price, the sale may not be reversed. However, the perishing of the price after the exchange does not prevent the sale from being reversed.
7. If the object of sale perishes prior to delivery, the sale is void. However, if the price perishes prior to delivery, the sale is not void.
8. The buyer may not re-sell movable merchandise before receiving it, whereas the seller may use or sell the price before he receives it.

¹⁴See *aqd Al-bay* of Professor Al-Zarqā’ (p.50), ‘Ibn ‘Ābidīn ((Hanafī), vol.4, [173]), Al-Khatīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.281).

9. The buyer must deliver the price before he has a right to receive the object of sale, unless the seller accepts otherwise.¹⁵

I now discuss the last three items in more detail:

Diminution in the object or price

The object of sale may perish totally or in part before or after the delivery.¹⁶

1. If the entire object of sale perishes prior to delivery:

- (a) If it perishes due to a natural disaster, due to actions of the object of sale itself, or due to actions of the seller, then the sale contract is voided.
- (b) If it perishes due to an action of the buyer, then the sale is not voided, and the buyer must pay the price.
- (c) If it perishes due to the actions of a third party, the sale is not voided, and the buyer has an option either to void the sale, or to conclude it, pay the price, and demand compensation from the third party who destroyed the good.

2. If the entire object of sale perishes after delivery:

- (a) If it perishes due to natural disaster, the actions of the object of sale itself, the actions of the buyer, or the actions of a third party, then the sale is not voided. The responsibility for compensation falls on the buyer, unless it was destroyed by the actions of a third party, in which case that responsibility falls on that third party. In either case, the seller's responsibility for the object of sale is transferred to the buyer once the goods are received by the latter.

- (b) If it perishes due to actions of the seller, we consider two cases:

- i. If the buyer received the object of sale with or without the seller's permission, but has paid the monetary price, or if the price is deferred, then the seller (like a third party) would be responsible to compensate the buyer for the perished goods.
- ii. If the buyer received the goods without the permission of the seller, and the price was due but had not yet been delivered to the seller, then the contract should be voided. In this case, the seller's transgression leads to the object of sale being returned to him, and he is responsible for compensation.

The Mālikīs ruled¹⁷ that the responsibility for compensation is transferred to the buyer in every sale except in five cases:

¹⁵See *‘Aqd Al-Bay’* by Professor Al-Zarqā’ (p.61).

¹⁶See Al-Kāsānī ((Hanafī), vol.5, p.238 thereon), Al-Sarakhsī (1st edition (Hanafī), vol.13, p.9), Ibn ‘Abidin ((Hanafī), vol.4, p.44), *‘Aqd Al-Bay’* (*ibid.*, p.92).

¹⁷Ibn Juzayy ((Mālikī), p.247), Al-Dardir ((Mālikī)B, vol.3, p.45).

- A. The sale of an absent object by description only, if the object of sale is not an immovable property (*‘aqār*). If the object is an immovable property, then the responsibility is transferred to the buyer.
- B. Whenever the sale contains options.
- C. Fruits sold before ripening fully.
- D. Objects that have to be fully measured by volume, weight, or number.
- E. Invalid sales.

In those five cases, responsibility stays with the seller until the buyer receives the goods.

The Shāfi‘ī is ruled¹⁸ that every object of sale is under the responsibility of the seller until the buyer receives them.

The Ḥanbalīs ruled¹⁹ that if the object of sale is measured by volume, weight, or number, and if it is spoiled prior to delivery, then it is the property of the seller. For other objects of sale, receipt by the buyer is not necessary, and if it is spoiled, it is still the property of the buyer.

3. Hanafī views on part of the object of sale perishing prior to delivery:

- (a) If it perishes due to a natural disaster, then there are multiple possibilities:
 - i. If the decrease in the object of sale is a decrease in quantity; i.e. part of an object of sale measured by volume, weight, or number perishes, then the contract is voided for the perished portion, and its portion of the price is deducted. In this case, the buyer has an option for the remainder of the contract due to its partition. He then has the right to execute the valid portion of the contract, or to void it.
 - ii. If the decline in value is in terms of characteristics (including all items that are part of a sale without mention; such as trees and buildings on a land, and quality of objects measured by volume or weight), then the sale is not voided, and no part of the price is deducted. This follows since characteristics have no explicit portion of the price. In this case, the buyer has the option to accept the goods for the full price, or to void the contract due to a defect in the object of sale.
- (b) If the destruction is caused by the object of sale itself (e.g. an animal that wounds itself), then the sale is not voided, and no part of the price is deducted. In this case, the buyer has the option of accepting

¹⁸ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.65).

¹⁹ Ibn Qudāmah (, vol.4, p.110).

the remainder of the object of sale for the full price, or voiding the entire contract.

- (c) If the destruction is caused by actions of the seller, then the contract is voided in proportion to the destruction, and the corresponding portion of the price is deducted, regardless of whether the decrease in the object is quantitative or qualitative. In this case, the characteristics of the object of sale do have a share in the price when there is a transgression against them. The buyer then has the option to take the remainder for its share of the price.
- (d) If the destruction is caused by the actions of the buyer, then the sale is not voided, and no part of the price is deducted, since he has in effect received the object of sale by spoiling part of it.

4. If part of the object of sale is destroyed after receipt:

- (a) If the destruction is caused by a natural disaster, or the actions of the buyer, the object of sale, or a third party, then the buyer is responsible for the destroyed part.
- (b) If the destruction is caused by actions of the seller, then:
 - i. If the receipt of the goods was with the seller's permission, and if the price is monetarily paid, or deferred, then he (like a third party) is responsible for compensation.
 - ii. If the receipt was without his permission, and if its price is due but not yet paid, then the sale is voided for the spoiled portion, and the price to be paid by the buyer is deducted accordingly.

Hanafi views on price perishing

If the price perishes during the contract session prior to receipt:

1. If it is fungible: the contract is not voided, since an equivalent price can be delivered. This is in contrast to the object of sale that is a non-fungible, and the buyer may have a specific use for a specific non-fungible.
2. If it perishes, and no substitute is immediately available, the Hanafis ruled that the contract is void, while 'Abū Yūsuf and Muhammad ruled that it is not void.²⁰ The proofs of the various positions will be discussed below in our discussion of the loss of value of the price.

Hanafi views on diminution of the price's value

If an individual buys an item in exchange for money denominated in a currency, and then the currency loses its value (e.g. stops being legal tender due to the issuing of a new currency) before receipt, the contract is void in the opinion of 'Abū Hanifa. In this case, the buyer is responsible to return the object of sale

²⁰ Al-Samarqandī ((Hanafi), vol.2, p.54, old edition).

if it is still intact, or its value or replacement object if it perished. This opinion is based on the fact that the defunct currency is no longer a price, and no sale is complete without a price. In this case, the loss of value of the price is treated like its perishing, and the sale must be voided.

'Abū Yūsuf and Muḥammad ruled that the sale is not voided, but that the seller is given the option to void it or to take the value of the monies originally agreed upon. This follows, since the monies are considered a liability on the buyer, and liabilities never perish. Thus, loss of value of the monies is not considered perishing, but rather a defect, thus giving the seller the option. This is similar to the case where the price is denominated in dates, which may be spoiled prior to receipt. Thus, they have ruled that loss of value is treated like a defect.

However, they all agreed that if the monies do not lose all their value, but are changed in value by appreciating or depreciating, then the sale is not voided, since change in price does not necessitate the invalidity of its "price-hood" (*thamaniyya*).

Then, 'Abū Yūsuf and Muḥammad disagreed among themselves on the timing of considering the value of the monies. 'Abū Yūsuf ruled that its value is considered at the time of the contract, since the price is due at the time of the contract, and that should be when its value is due. Muḥammad, however, ruled that its value is considered at the time it loses value, which is the last day people used that currency, since that is the time delivery became impossible.²¹

Reselling unreceived merchandise

The Ḥanafīs ruled unanimously that it is not valid to resell a movable object of sale before receipt, since the Prophet (pbuh) has forbidden the sale of what one has not received.²² Prohibition results in the invalidity of the forbidden transaction. Moreover, this sale incorporates excessive risk and uncertainty (*gharar*) since it may be voided if the object of sale perishes, which would invalidate the first sale and void the second. The Messenger (pbuh) has forbidden such sales with excessive risk and uncertainty (*gharar*).

As for immovable property, it is discretionally valid to resell it before receiving it in the opinion of 'Abū Hanifa and 'Abū Yūsuf, based on the general permissibility of sales in the Qur'ān, which cannot be made specific based on a *Hadīth* with very few chains of narration. Moreover, there is no excessive risk and uncertainty when selling an immovable property since its perishing is very

²¹See Al-Kāsānī ((Hanafī), vol.5, p.242), Ibn 'Ābidīn ((Hanafī), vol.4, p.25).

²²There are a number of *Hadīths* among which some are agreed upon by Al-Bukhārī and Muslim , as well as Al-Tirmidhī, based on the *Hadīth* on the authority of 'Ibn 'Abbas forbidding the sale of that which has not been received. Among those *Hadīths* is the one narrated by Al-Nasā'ī on the authority of Hakīm ibn Hizām, who said: "I said, O Messenger of Allāh, I am a man who buys goods and resells them; which of those sales are permitted, and which are forbidden?" He (pbuh) said: "Do not sell anything until you receive it". This *Hadīth* was also narrated in *Musnad* 'Aḥmad and 'Ibn Ḥibbān in Al-ṣahīḥ, as: "If you buy goods, do not sell them until you receive them" (Al-Hāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.32), 'Ibn Al-'Athīr Al-Jazārī (, vol.1, p.380), *Takhrīj 'Ahādīth Al-'Iḥyā'* (vol2, p.61)).

unlikely.

Muhammad, Zufar and Al-Shāfi‘ī ruled that it is not valid to sell an immovable property prior to receiving it due to: (i) the generality of the *Hadīth*'s prohibition of selling what has not been received, (ii) the inability to deliver the object of sale, and (iii) the existence of excessive risk and uncertainty (*gharar*).²³ The opinions of various jurists will be discussed in detail below in the context of invalid sales.

Reselling an un-received price

It is valid to resell prices prior to receipt,²⁴ since they are liabilities. Similarly, it is valid to resell various liabilities such as dowry, wages, compensations for spoiled goods, etc. prior to receiving them. The proof of this opinion is in the narration on the authority of ‘Umar (mAbpwh) that he said: “O Messenger of Allāh: we sell camels in Al-Baqī‘, and take silver coins in place of gold coins, and gold coins in place of silver coins.” The Messenger (pbuh) said: “There is no harm if the exchange is based on the prices that day, and you departed without any unfinished business”.²⁵ This proves the permissibility of receiving an alternative price for the object of sale. The point of the *Hadīth* forbidding the resale of that which has not yet been received relates to non-fungibles, not to liabilities that may be received in the form of replacement of equal value.

They have made an exception to the rule of validity of reselling price prior to receipt in the two contracts of currency exchange and forward sale. In the case of currency exchange, the exception is based on both exchanged items being an object of sale on the one hand, and a price on the other. When considered the object of sale, it is not valid to resell it. Due to this obscurity, I have found the prohibition to be a safer choice. As for the forward contract, the object of contract may not be resold since it is an object of sale, and the price inherits from the object of sale the property of forbidding resale according to Islamic Law.²⁶

Notice that reselling prices and fungibles is valid in sale, gift, leasing, and will (i.e. with or without compensation) whether they are not subject to specification (such as money), or can be specified (such as fungibles measured by volume or weight). This is the case for the person with the liability to deliver the fungibles; e.g. the seller may buy from the buyer an item in exchange for the price that he owes, to rent a house owned by the buyer in exchange for such a price, or to give him the price as a gift.

²³ Ibn Al-Humām ((Hanafi), vol.5, p.264), Al-Kāsānī ((Hanafi), vol.5, p.180 thereon, p.234), Ibn ‘Ābidīn ((Hanafi), vol.4, p.169 thereon).

²⁴The price consists of items that can constitute a liability in compensation for goods, such as monies, or fungibles measured in volume or weight if identified and exchanged for non-fungibles, or non-identified but stated in the contract following “for” in “I sold you ... for ...” (Ibn ‘Ābidīn ((Hanafi), vol.4, p.173)).

²⁵Narrated by ‘Ahmad and ‘Ashāb Al-Sunan Al-‘Arba‘a on the authority of Ibn ‘Umar; see Ibn Al-‘Athīr Al-Jazarī (, vol.1, p.469), and Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.33).

²⁶Al-Kāsānī ((Hanafi), vol.5, p.234), Ibn Al-Humām ((Hanafi), vol.5, p.269 thereon), Ibn ‘Ābidīn ((Hanafi), vol.4, p.173 thereon).

It is not valid to resell a debt or liability to anyone other than the debtor (e.g. as in buying a horse from A in exchange for \$100 owed by B), except in three forms:²⁷

1. If he commissions him to collect the debt, thus making him a legal agent to collect on behalf of the represented, then a collector for himself.
2. Transfer.
3. Will.

Object and price delivery

Delivery²⁸ of the object of sale to the buyer is one of the obligations on the seller ensuing from the sales contract. Similarly, delivery of the price to the seller is one of the obligations on the buyer ensuing from the sale contract. Mutual delivery of the two parts of the transaction is an obligation on the parties of the contract, since ownership of the two parts is exchanged.

One may ask: who should deliver his obligation first? In particular, does the seller have the right to retain possession of the object of sale until the entire price is delivered? Moreover, what modes of delivery and receipt of the two items may be used?

The item that must be delivered first is determined by the nature of the two elements of the transaction:

- If the sale involves the exchange of non-fungibles for other non-fungibles, then delivery of the two elements must be mutual. This mutual delivery is necessary to ensure equal compensation to the two parties, neither of whom deserves to receive their part of the exchange first.
- The same applies if the sale involves the exchange of fungibles for fungibles; e.g. in currency exchange transactions, as described above.
- If the sale involves an exchange of a non-fungible for a fungible²⁹ then the Hanafis ruled that the order should be respected. The buyer in this case must deliver the price (i.e. the fungibles) first, if the seller asks him for it, and until it becomes identified. This follows the saying of the Prophet (pbuh): “Debts (or liabilities) must be fulfilled immediately”³⁰ Thus,

²⁷Ibn ‘Abidin ((Hanafi), vol.4, p.173), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.71).

²⁸Delivery (*al-taslīm*) denotes detaching the seller’s claims to the object of sale, thus enabling the buyer to take it and use it.

²⁹Recall, fungibles are items in which a liability may be denominated, be it money or otherwise. In contrast, non-fungibles may not be used to denominate a liability ('Ibn 'Abidin ((Hanafi), vol.4, p.26)).

³⁰Narrated by 'Ibn 'Udayy in *Al-Kāmil* on the authority of 'Ibn 'Abbās. The full text is that the Prophet (pbuh) said: “Al-za‘mu ghārim wa al-dayno maqdiyy, wa al-‘āriyato mu‘addāh, wa al-minhāto mardūdah”, and he narrated it based on the narration of 'Ismā‘il ibn Ziyād Al-Sukūnī, and he denied the correction of this *Hadīth* (see Al-Hāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.58)). It was reported by 'Aḥmad and 'Aṣḥāb Al-Sunan with the exception of Al-Nasā'i. The chain of narration includes 'Ismā‘il 'Ibn 'Ayyāsh (see Al-Hāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), p.250)).

if the delivery of the price is after the delivery of the object of sale, the financial liability would not have been fulfilled. Following the delivery of the price, the seller should deliver the object of sale when the buyer requests it, to equalize the conclusion of the transaction. Two exceptions to this rule are: (i) the object of a forward sale, since it is a deferred fungible, and (ii) deferred price, in which case, the seller should deliver the object immediately, since the seller would have forfeited his own right of withholding by accepting deferment of the price delivery.³¹

The Mālikīs³² agreed with the Ḥanafis that the buyer is obliged to deliver the price, and the seller is obliged to deliver the object of sale. If one of them insists not to deliver what he possesses until he receives its compensation, the buyer is forced to deliver the price first, and then he receives the object of sale from the seller. Mālik ruled that the seller has the right to withhold the object of sale until he receives the price. The proof of the Mālikīs and Ḥanafis is that the seller is in the same position as a pawn-broker, who withholds the object and does not have to deliver it until after he receives the price.

The Shāfi‘īs and Ḥanbalīs ruled³³ that if there is a dispute over delivery and price was due as a liability on the buyer, and if the seller says: “I shall not deliver the object of sale until I receive its price”, and the buyer says: “I shall not deliver the price until I receive the object of sale”, then the seller is forced to deliver the object of sale first, and later the buyer is forced to deliver the price. This follows since the buyer has a right to the specific non-fungible object of sale, whereas the right of the seller is a liability on the buyer. In this case, priority is given to the delivery of non-fungibles. In addition, whoever delivers his side of the contract first forces the other to deliver the other, since both sides have a right and a liability. However, the Shāfi‘īs restricted this ruling to the cases where the seller does not fear being exposed to risk due to the lapse of time, in which case he has the right to withhold the object until he receives the price. Similarly, the buyer has the right to withhold the price if he fears the risk of delaying the delivery of the object of sale.

The right to withhold the object

Given the discussion above of the obligation on the buyer to deliver the price first, it follows that the seller has the right to withhold the object of sale from the buyer until he receives the part that must be delivered first, be it the entire price or a part thereof.³⁴

³¹ Al-Sarakhsī (1st edition (Ḥanafī), vol.13, p. 192), Al-Kāsānī ((Ḥanafī), vol.5, p.244), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.109), 'Ibn 'Abidīn ((Ḥanafī), vol.4, p.43 onwards).

³² Al-Khaṭīb Al-Shirbīmī ((Shāfi‘ī), p.247).

³³ Al-Khaṭīb Al-Shirbīmī ((Shāfi‘ī), vol.2, p.74), 'Ibn Qudāmah (, vol.4, p.198).

³⁴ See Al-Sarakhsī (1st edition (Ḥanafī), ibid.), Al-Kāsānī ((Ḥanafī), vol.5, p.249), 'Ibn 'Abidīn ((Ḥanafī), vol.4, p.44), *'Aqd Al-Bay'* by Professor Al-Zarqā' (p.77).

The two conditions that justify the right to withhold the object of sale from the buyer are:

1. That one of the items of the exchange is non-fungible, and the other is fungible (e.g. a commodity in exchange for an amount of money denominated in some currency). If the two items are both fungible or both non-fungible, then the exchange must be contemporaneous.
2. That the price is due immediately. If the price is deferred, then the seller does not have the right to withhold the object of sale, since that right is voided by deferring the price.

Thus, if the price is deferred except for one unit of currency, the seller has the right to withhold the entire object of sale, since that right is not partitioned. Similarly, if the seller receives the entire price save for one unit of currency, or if he drops all of the price except for one unit of currency, he still has the right to withhold the object of sale.

'Imām Mālik ruled that³⁵ the seller has the right to withhold the object of sale until he receives the price.

The Ḥanbalīs ruled³⁶ that the seller does not have the right to withhold the object of sale contingent on receiving the price, since delivery is one of the requirements of the contract. If the two parties disagree about the order of delivery, the seller is forced to deliver the object of sale, then the buyer is forced to deliver the price.

The Shāfi'īs ruled³⁷ that the seller has the right to withhold the object of sale until he receives the price, for fear of excessive risk. Similarly, the buyer has the right to withhold the price until he receives the object of sale for fear of excessive risk.

Forfeiting the right to withhold

If the buyer provides a pawned object or a guarantor to guarantee the price, the right to withhold the object is not voided. This follows since the pawning or guaranteeing does not void the buyer's liability for the price, or forfeit the seller's right to demand it. In this case, the pawned object or guarantor only confirm that the price can be delivered, but the seller retains the right to withhold the object until the price is delivered to him.

As for transferred money equivalent in value to the price, it does void the right to withhold the object of sale in the opinion of 'Abū Yūsuf, whether the seller transferred the collection of the price to a third party who accepted it, or whether the buyer transferred the seller's right to collect to a third party. In this case, the buyer has fulfilled his obligation towards the seller, and the right to withhold the object of sale is based upon the liability of the buyer to pay the seller. Since the liability is transferred to a third party, the right to withhold

³⁵Ibn Juzayy ((Mālikī), p.247).

³⁶Ibn Qudāmah (, vol.4, p.198).

³⁷Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.75).

the object of sale is voided. The seller no longer has the right to demand the price from the buyer, and may only demand it from the third party to whom the liability was transferred.

Muhammad ruled that if the transfer is from the buyer, it does not void the seller's right to withhold the object of sale, and he may withhold the object until he receives the price from the third party to whom the liability was transferred. If the transfer originates from the seller, then: (i) if the transfer is unrestricted (*mutlaq*), it does not void the right to withhold the object of sale; (ii) if it is restricted (*muqayyad*) by sending a debtor/creditor (*gharīm*) to collect the debt from the buyer, then the transfer of liability voids the right to withhold the object of sale. The proof of this opinion is that the seller's right to demand delivery of the price is not forfeited by a transfer originated by the buyer, or an unconditional one originated by the seller. However, a conditional transfer by the seller voids the right to demand delivery of the price, and hence forfeits the right to withhold the object of sale.³⁸

Al-Kāsānī said: "The correct opinion is that of Muhammad, since the right to withhold the object of sale is legally predicated on the right to demand delivery of the price, and not on the actual delivery of the price itself".³⁹

In summary, it is unanimously agreed that the right to withhold the object of sale is forfeited if the seller issues a transfer of the right to collect the price. For 'AbūYūsuf, the same applies if the buyer issues a transfer of the obligation to pay the price to a third person who accepts it. There are two narrations regarding the position of Muhammad on this issue, the more credible of which was narrated above.

- If the seller lends the object of sale to the buyer, or gives it to him for safekeeping, the right to withhold the object is forfeited. Thus, the seller may not re-claim the object of sale. This follows from lending or giving to safe-keep being a liability on the buyer, who cannot act as a legal agent of the seller for that object of sale since he has a primary ownership claim. Thus, the possession of the goods is primary for the buyer, and once he gets the object of sale into his possession, it becomes a possession of ownership that cannot be reversed by a re-claim of the seller.⁴⁰
- If the buyer lends the object of sale to the seller, or leases it to him, or gives it to him for safekeeping, the right to withhold the object from the buyer is not forfeited. This follows since those actions would not be valid when originating from the buyer, since the authority to withhold the object of sale is originally given to the seller, and thus he (the seller) cannot be withholding it as a legal agent of another.⁴¹
- If a third party transgresses against the object of sale, and the buyer chooses to make the transgressor liable for the object of sale, then the

³⁸ Al-Sarakhsī (1st edition (Hanafi), vol.13, p.195), Al-Kāsānī ((Hanafi), vol.5, p.250), 'Ibn cĀbidīn ((Hanafi), vol.4, p.44).

³⁹ Al-Kāsānī ((Hanafi), ibid., p.251).

⁴⁰ Al-Kāsānī ((Hanafi), vol.5, p.250), 'Ibn cĀbidīn ((Hanafi), vol.4, p.44).

⁴¹ Al-Kāsānī ((Hanafi), vol.5, p.246).

right of the seller to withhold the object is forfeited in the opinion of 'Abū Yūsuf. This will be further discussed in what follows.

- If the buyer receives the object of sale with the permission of the seller, the right to withhold the object is forfeited. Thus, the seller has forfeited the right to reclaim the object of sale by giving the permission for delivery.
- If the buyer takes possession of the object of sale without the permission of the seller, but after the price has been paid, then the right to withhold the object is forfeited. Thus, the seller has forfeited the right to reclaim the object by receiving the price, which makes the receipt of the goods a satisfaction of the buyer's right.
- If the buyer takes possession of the object of sale without the permission of the seller and prior to delivering the price, then the right to withhold the object is not forfeited, and the seller may reclaim the object of sale. Thus, the seller retains the right to withhold the object until he receives the price, and this right cannot be voided without his consent.
- If the buyer has already resold or used the object of sale in the latest case, then:⁴²
 - If the dealing of the buyer can be voided (e.g. sale, gift, leasing, pawning, etc.), then the seller can void that transaction and reclaim the object of sale, since he retains the right to that object.
 - If the dealing of the buyer cannot be voided (e.g. the freeing of a slave, automatic freeing of a slave following the death of his master, or impregnating of a slave woman with automatic freeing following the death of her master), then the seller may not reclaim the object. Thus, there is no gain in retaining the right to withhold the object of sale since the withholding of a free person, or a person who will become free, is not valid.

Delivery and receipt: meaning and means

Delivery and receipt are defined thus by the Ḥanafīs: it is the removal of all obstacles by the seller between the buyer and the object of sale, allowing the buyer to use the object. Thus, the seller would have delivered the object of sale, and the buyer would have received it.⁴³ The same applies to the delivery of the price by the buyer to the seller.

Receipt may occur through a number of different mechanisms:

1. **Giving full access and permission (*al-takhlīya*):** Thus, the buyer would have full access to the object of sale with the full permission of the seller. Thus, if a person purchases wheat in a house, and the seller gives him the key to the house saying: "I have given you full access and

⁴² Al-Kāsānī ((Hanafi), vol.5, p.246).

⁴³ Al-Kāsānī ((Hanafi), vol.5, p.244).

permission to take the object of sale”, then the buyer would have received the object of sale.⁴⁴ However, if he gives him the key without saying anything, then it is not a receipt by the buyer. For a house or land, delivery is concluded when the buyer stands in it or near its edge or door (to the point where he can close it at that moment). If the distance is larger than that, then it is not a receipt.⁴⁵ Thus, receipt for the Ḥanafīs is concluded with full access and permission, whether the object of sale is immovable property or movable goods, with the exception of goods measured by volume or weight in which case receipt is concluded after its measure is verified.

The Mālikīs and Shāfi‘īs ruled that the receipt of an immovable property such as land or buildings, etc. is concluded by giving access and permission to the buyer, by delivering keys if they exist. Receipt of movables such as furniture and animals is determined based on convention prevailing among the people trading.⁴⁶ Convention dictates that delivery is determined either by exchanging hands (e.g. for clothing and books) or by transportation from one place to another (e.g. for an animal or a locomotive).

The Hanbalīs ruled that taking possession of any item is determined by the item’s nature. Thus, if it is measured by volume or weight, then its transfer of possession is actualized by verification of its measure. In other words, receipt is defined by convention.⁴⁷

2. Spoiling: If the buyer spoils the purchased goods while they are in the possession of the seller, then he is considered a recipient of the goods, and he is liable for the price. This follows since giving access and permission implies giving the ability to affect the objects, and spoiling the goods certainly affects them. Causing a defect in the goods (quantitative or qualitative) has the same status as spoiling them. Moreover, if the buyer orders the seller to spoil the goods, and he does so, (e.g. if he asks him to mill wheat into flour), he would have acted on behalf of the buyer and the ruling is the same.⁴⁸

3. Giving the object to the buyer for safekeeping or lending it to him: In this case, the buyer is considered a recipient of the object of sale, since it is not valid for him to be a borrower or safe-keeper as discussed above. Similarly, if the buyer gives the object to a third party for safekeeping, or lends it to such a third party, and asks the seller to deliver

⁴⁴One of the general juristic rules for the Ḥanafīs is that “giving full access and permission to the buyer is a receipt” by the buyer. Thus, it is considered a receipt, even though the buyer did not literally receive the goods. Thus, if the object of sale perishes, it would be the loss of the buyer. See *Al-Farā’id Al-Bahiyya fī Al-Qawā‘id Al-Fiqhiyya* by Shaykh Maḥmūd Ḥamza (p.63).

⁴⁵Al-Kāsānī ((Hanafi), ibid.), ‘Ibn ḨĀbidīn ((Hanafi), vol.4, p.44), *‘Aqd Al-Bay‘* by Professor Al-Zarqā‘ (p.68).

⁴⁶Al-Dardīr ((Mālikī)A, vol.3, p.145), Al-‘Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī)), vol.9, pp.301-309), and ‘Abū-Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.263).

⁴⁷Ibn Qudāmah (, vol.4, p.111 onwards).

⁴⁸Al-Kāsānī ((Hanafi), ibid.), ‘Ibn ḨĀbidīn ((Hanafi), ibid.).

it to him, then he is considered a recipient of the goods. This follows since lending or giving for safekeeping to a third party is valid, and by establishing another as a legal agent, receipt by that party is tantamount to his own receipt.

However, if the buyer gives the object to the seller for safekeeping, or as a loan or lease, then it is not a receipt, since such actions by the buyer are invalid. This follows from the seller's primary right of withholding of the object, hence he cannot hold it as an agent of another.⁴⁹

4. Prosecution of a transgressor on the object of sale by the buyer:

In this case, 'Abū Yūsuf has ruled that the buyer, who chooses to prosecute the transgressor to collect compensation, is considered in receipt of the object of sale. Thus, if the object of sale perishes, the loss would be the buyer's, and the price would still be due as a liability on him, and the sale is not voided.

Muhammad ruled that he is not considered in receipt and the seller remains responsible for the goods, and any compensation must go to him. In this case, if the object of sale perishes, it is a loss for the seller, the sale is voided, and the buyer is no longer responsible for the price.

The proof of 'Abū Yūsuf is that the transgression by a third party occurred implicitly under permission by the buyer, and thus he is in receipt as if he himself transgressed against the object of sale. The explanation of this proof is that the buyer's choice to prosecute the transgressor – demanding compensation – is tantamount to assuming ownership of the object upon which the transgression occurred. This follows by a ruling that once a person is responsible for compensation of any item, it is retroactively considered owned by that party at the time of destruction requiring compensation. In this way, the transgression can be seen to have happened by order from the buyer.

The proof of Muhammad is that the compensation is related to the specific existing object of sale. Now, if that existing object were to perish prior to receipt by the buyer, it is the responsibility of the seller. The same argument then applies to a destruction in the value of the existing item.⁵⁰

5. Prior receipt: All of the above relates to the case where the object of sale is in the possession of the seller. If, on the other hand, it is in the possession of the buyer through an earlier receipt, and then it was sold to him by the item's owner, one may ask: would the buyer be considered in receipt immediately following the purchase, or would a new receipt be necessary to establish delivery? Jurists made a distinction here based on the effect of receipt:

- **Receipt/possession of guaranty (*qabd al-damān*):** This is the case where the recipient is considered responsible to another party

⁴⁹Al-Kāsānī ((Hanafi), vol.5, p.246).

⁵⁰Al-Kāsānī ((Hanafi), ibid.).

for the items that he received. Thus, if the item perishes (even if by natural disaster) while in his possession, he is responsible to compensate that other party. Examples include usurped objects in the possession of the usurper, and an object of sale in the possession of the buyer.

- **Receipt of trust (*qabḍ al-'amāna*):** This is the case where the recipient is not responsible for the item unless he destroys it or is negligent in safekeeping it. Examples include deposits, loans, rentals, or the property of a company in the possession of the depositor, borrower, renter, or partner.

Jurists ruled that the first type of receipt is stronger due to the resulting responsibility for compensation. The general rule is this: a receipt in the past can play the role of the receipt necessary for the sale if the two types of receipt have the same properties in terms of responsibility for compensation, or if the earlier receipt was of a stronger kind. Thus, a receipt of guaranty can replace a receipt of trust or a receipt of guaranty, whereas a receipt of trust may only replace another receipt of trust.⁵¹

Thus, we can identify two cases where the buyer has possession of the object of sale before the sale is concluded, according to whether the possession is one of guaranty or one of trust:

- (a) If the buyer's possession is a one of guaranty, there are two cases:
 - i. Either it is in the possession of the buyer himself (as in the case of a usurper, or a buyer who received prior to purchase), in which case the contract itself makes the buyer a recipient, and it is not necessary to renew the receipt. Thus, the seller has fulfilled his obligation to deliver, whether the object of sale is present or absent at the contract session. This follows since the usurped object would be compensated by itself, and so is the object of sale after receipt. As the two receipts were of the same kind, one may replace the other.
 - ii. Or, it is in another person's possession of guaranty (e.g. if the pawnner buys the pawned object from the pawn-broker) then he is not a recipient, unless the pawned object (*rahn*) is present in the contract session, or if he goes to its location and can receive it. This follows since the pawned object is not compensated with itself, but rather with another (which is the debt on the pawnner), whereas the object of sale is compensated with itself. Thus, the two compensations were different. Moreover, the pawned object is in a receipt of trust, which is not compensated by itself. Thus, if the pawned object were to perish, the debt would perish

⁵¹ Al-Kāṣānī ((Hanafi), vol.5, p.248), 'Ibn Al-Humām ((Hanafi), vol.5, p.200), 'Ibn 'Abidīn ((Hanafi), vol.4, p.535), *Majma' Al-Damānāt* by Al-Baghdādī (p.217), and *'Aqd Al-Bay'* by Professor Al-Zarqā' (p.87 onwards).

accordingly, not as a compensation, but due to the legal link between the debt and the pawned object. Thus, any loss in the pawned object is a loss to the pawn-broker, and the debt is reduced in proportion to the loss in the pawned object. Also, the receipt of trust (which is the case for a pawned object), may not substitute for a receipt of guaranty.

- (b) **If the possession of the buyer is a possession of trust:** For example, if it is possession by a borrower or a recipient of deposits for safekeeping, then he is not considered a recipient, unless the object is present in the contract session, or if he goes to it and can receive it. This follows since the possession of trust is different from the possession of guaranty, and thus may not replace it.⁵²

⁵²Al-Kāsānī ((Hanafi), vol.4, p.248), 'Ibn Al-Humām ((Hanafi), vol.5, p.200).

Chapter 4

Invalid and Defective Sales

4.1 Introduction

Contracts are divided into valid and invalid from the point of view of their legal status and description, and based on the degree of satisfaction of their cornerstones and conditions.

- **A valid contract:** is one that satisfies all of its conditions and cornerstones.
- **An invalid contract:** is one where one or more of its conditions and cornerstones are violated, and without any consequence.

In this regard, a sale is invalid (*bātil*) if and only if it is defective (*fāsid*). The Ḥanafīs, however, divide contracts into three categories: (i) valid, (ii) defective, and (iii) invalid. Thus they distinguish – among the contracts that are not valid – between those that are invalid and those that are defective.

The source of disagreement is each party's interpretation of the legal prohibition of certain contracts. In this respect, jurists ask the question whether a contract's prohibition entails defectiveness (i.e. lack of validity and committing a sin), or whether it may in some cases entail the committing of sin while the contract remains valid. Another question jurists ask is whether the prohibition of one of the main components of a contract is equivalent to a prohibition of a general characteristic that is satisfied in the contract.

The majority of jurists ruled that the prohibition of any contract means that it is invalid, and that whoever engages in such a contract commits a sin. Moreover, they ruled that the prohibition of a main component (*rukñ*) of a contract is equivalent to a prohibition of a general characteristic (*wasf*) that is satisfied in that particular contract. This is based on the *Hadīth* of the Prophet (pbuh): “Whoever commits an action that is alien to our affair (religion), then he is an apostate; and whoever introduces into our religion something alien to

it, then he is an apostate".¹

Whenever the actions of an individual disagree with the orders and commands of the Legislator (Allāh almighty), this action is characterized by defectiveness and invalidity. This applies regardless of whether the transgression is a fundamental component of the action or a general characteristic thereof, and regardless whether they pertain to acts of worship or to everyday interactions with others.

The Ḥanafīs, however, ruled that the Legislator may forbid a contract with the consequence of making those who commit it sinners, without invalidating the contract. They also distinguish between the prohibition of the fundamental components (*'arkān*) of a contract, which invalidates it, and the prohibition of a general characteristic (*waṣf*) of the contract that only leads to viewing it as defective.² This is due to the general assessment of transactions based on the benefits to mankind. Thus, if the transgression of an action pertains to its nature (e.g. selling a non-existent object), there is no potential benefit, and the contract is invalid. However, if there is a potential benefit resulting from the action, and if the reduction in benefit can be ameliorated by the removal of its cause, then the transaction is called defective. This would be the case when the transgression of the action pertains to one of its incidental characteristics while its main components (i.e. cornerstones, parties to the transaction, and object) are valid. Thus, the Ḥanafīs classify sales into three types based on the Legislator's evaluation of their components: (i) valid, (ii) defective, and (iii) invalid.

As for acts of worship, the Ḥanafīs ruled that defectiveness and invalidity are equivalent in this regard. This follows from the ruling that any deviation from the orders of the Legislator in matters of worship, whether in a fundamental or ancillary component, is both defective and invalid. The reason for this is that acts of worship require complete obedience and following of orders, thus any transgression thereof would violate its validity.

A valid sale is one that is legal both in its fundamental and ancillary components,³ with respect to which no third party has a right, and that contains no options. Its legal status is that its consequences become applicable instantly. The consequences of a valid sale is the exchange of ownership of the object of

¹Narrated by Muslim on the authority of *‘Ā’ishat*, and in a narration of Al-Bukhārī, Muslim and ‘Abū Dāwid: “Whoever introduces in this affair of ours something alien to it is an apostate”, *Ibn Al-‘Athīr Al-Jazarī* (, vol.1, p.197).

²See *Al-Amwāl wa Nazariyyat Al-Nuqūd* by Dr. Muhammad Yūsuf Mūsā (p. 436 onwards). The better opinion is that the consequences of a prohibition of a general characteristic of a contract are legally equivalent to those of a prohibition of a fundamental part thereof. In this respect, defective and invalid sales are one and the same. See *Uṣūl al-Buyū‘ al-Mamnū‘a* by Professor *‘Abd Al-Samī‘ Imām*, Ph.D dissertation at Al-‘Azhar (p.147).

³The fundamental components of the contract are its cornerstones and its object. The cornerstones are the offer and acceptance, and it is legal if it has no defects (e.g. that the offer or acceptance was issued by an insane person or a non-discriminating child). The object of sale is legal if it is a property with potential permitted benefits. The ancillary components of a contract are its other characteristics in addition to its cornerstones and object (e.g. a condition that violates the nature of the contract, if the object of sale was not deliverable, or the definition of a price that is a characteristic ancillary to the contract).

sale and price. Thus, if the sale contains no options, the buyer's ownership of the object of sale, and the seller's ownership of the price, are actualized immediately following the offer and acceptance.

An invalid sale is one: (i) whose cornerstones and conditions on the object are not satisfied; or (ii) that is illegal in its fundamental and ancillary characteristics (e.g. one of the parties of the contract is not eligible, or if the object of sale may not be used in this type of contract). Its religious status is that the contract is in effect not concluded, even though its outer appearance may resemble a concluded contract, and the exchange of ownership does not result (e.g. contracts concluded by a child, or an insane person, if the object of sale is not a good such as a dead animal, or if the object of sale is forbidden such as wine and pork).

If a sale is invalid, the owner does not benefit by receiving the object, thus if the object of sale perishes in the possession of the buyer, it is treated as a possession of trust. This follows from the contract not being considered in effect concluded, and thus receipt is considered to be with the permission of the owner (who remains to be the seller). This is the opinion of 'Abū Ḥanīfa. For other jurists, the object in this case would be in a possession of guaranty, since it is of no lower status than that which is received while negotiations over the contract are in progress. This is the opinion of 'Abū Yūsuf and Muḥammad. The price received following an invalid sale, as well as the price received following a defective sale, are considered in a possession of guaranty by the seller.

A defective sale is one that is fundamentally legally sound, but that has a violating forbidden characteristic. For example, the sale of an item with uncertainty that may lead to dispute, such as a house or car owned by a person without specifying the person, the car or the house. Another example is including two sales in one contract, such as selling someone a house on condition that the other person sells the first a car. More examples will be studied in detail below. The legal status of a defective sale is that ownership is actualized by receipt with the explicit or implicit permission of the owner (e.g. implicitly if the receipt takes place during the contract session, without any objection from the other party). This is the Hanafi position, which is to be contrasted with the position of the majority of jurists, who view that ownership may not ensue from defective sales, just as in the case of an invalid sale.⁴

Defective and invalid contracts

If defectiveness pertains to the object of sale, then the sale is invalid (e.g. the sale of wine, pork, a dead animal, blood, or an animal hunted in sanctuary of Mecca during ritual consecration (*'ihrām*)). In this case, the sale does not lead to ownership of the object by the buyer, even if he receives it, since a Muslim may not gain ownership of such objects through a sale. In particular, dead animals and blood are not legally beneficial properties, and the Legislator has

⁴Ibn Al-Humām ((Hanafi), vol.5, p.185 onwards), Al-Kāsānī ((Hanafi), vol.5, p.299), 'Ibn ēĀbidīn ((Hanafi), vol.4, p.104), *Majma' Al-Damānāt* (p.215 onwards), and *Nazariyyat Al-Aqd* by Dr. Yūsuf Müsā (p.440 onwards).

forbidden the ownership of hunted animals while the person is in a state of ritual consecration (*'ihram*).

If defectiveness pertains to the price, and if the price qualifies as property in other religions or is desirable for some people (e.g. wine, pork, hunted animal during *'ihram*), then the sale is defective but concluded for the value of the object of sale. In this case, ownership of the object of sale is actualized by receipt, since specification of the desired price is proof of the intention of the two parties to conduct a sale; thus the sale is concluded for the value of the object of sale.⁵

If the price is a dead animal or blood, the Hanafis disagree on the status of the sale. The majority ruled that the sale is thus invalid, while some ruled that it is defective. The correct opinion in this case is that the sale is invalid since the price is not a good with potential benefit.⁶

Following this introduction, we mention examples of sales that at least some jurists classified as invalid, followed by examples of defective sales. Later, the status of defective sales and their consequences will be discussed in detail.

I have distinguished between examples of invalid and defective sales to avoid confusion, in contrast to what most books of Hanafi jurisprudence discuss under the heading of defective sales. The majority of such books use the term “defective sales” to mean the more general category of “defective and invalid sales”, i.e. all the ones that are legally prohibited. It is also common for the authors of such books to use the term “defective” (*fāsid*), when they really mean “invalid” (*bātil*). The reader is then forced to infer their meaning from the surrounding text or by telling statements such as their saying: “thus the contract does not become valid” in the case of invalid sales, and “thus the contract returns to being valid” in the case of defective ones.

4.2 Types of invalid sales

The most important types of invalid sales are the following:

4.2.1 Sale of a non-existent object

The top scholars of all schools of jurisprudence have agreed that the sale of non-existent objects, and objects that may cease to exist, is not concluded. This includes the sale of offspring of the offspring, the sale of an unborn animal in the womb, and the sale of fruits and plants before they appear. This is based on the Prophet (pbuh) “prohibiting the sale of the unborn animal in the womb of its mother”.⁷ He also prohibited the sale of the male camel’s sperm and the

⁵The difference between the price and value of an object: the price is what the two parties agree on, whether in excess or diminution of its value. The value is what the object is assessed for, which is equivalent to a measure with no excess or diminution.

⁶Al-Sarakhsī (1st edition (Hanafi), vol.13, p.22 onwards), Al-Kāsānī ((Hanafi), vol.5, pp.186.227), 'Ibn Al-Humām ((Hanafi), vol.5, pp.299,305).

⁷Narrated by Al-Bukhārī, Muslim, 'Aḥmad, Mālik in *Al-Muwaṭṭa'*, 'Abū Dāwūd, Al-Nasā'ī, and Al-Tirmidhī on the authority of 'Ibn 'Umar that the Messenger of Allāh (pbuh) “has

female camel's eggs.⁸ He also prohibited the sale of fruits before they are shown to be good, as discussed below.

In the same category as the sale of a non-existent object are: the sale of pearls in shells, milk in an udder, wool on the backs of sheep, and a book before it is printed. The sale of all of those is invalid for the Shāfi‘īs and Ḥanbalīs, since the object of sale does not exist with certainty. This is based on the *Hadīth* on the authority of ’Ibn ‘Abbās that “The Messenger of Allāh (pbuh) prohibited the sale of a fruit before its quality is known, the sale of wool on the back of sheep, and the sale of milk in a udder”.⁹ The latter prohibition is due to the ignorance regarding the quality and volume of the milk in an udder. The volume is not known since an udder may seem full due to fat rather than milk. The quality of the milk in an udder is also unknown with regards to clarity or lack thereof. Thus, the milk in an udder is similar to an unborn animal in a womb, since its sale would be the sale of a specific item that has not yet been realized. Another reason for this prohibition is that such an item is not deliverable at the time of sale, since milk does not collect in the udder all at once, but rather gradually. Thus, the object of sale gets mixed with other milk in a manner that makes distinguishing between them impossible.

However, the milk of a wet-nurse may be sold to be consumed as needed by the infant.

The Hanafīs, with the exception of ’Abū Yūsuf, ruled that the sale of milk in an udder, pearls in shells, or wool on the backs of sheep, are all defective due to ignorance and the prohibiting *Hadīth*. In the case of wool, it is continuously growing, and thus the object of sale (the wool on the back at the time of sale) may get mixed with that which grows afterwards, which makes a demarcation difficult. Thus, the sale becomes defective.¹⁰

’Abū Yūsuf ruled that the sale of wool on the backs of sheep is valid, and that it may be agreed upon since it can be cut prior to slaughtering the sheep. Thus, it may be sold in the same manner that plants may be sold while they are in the ground.

Those who ruled that the sale of wool on the backs of sheep is invalid base their opinion on the existence of uncertainty and excessive risk (*gharar*), since wool grows continually. Thus the wool that is present at the time of the contract gets mixed with that which grows later, and it is impossible to separate the two.

prohibited the sale of the unborn animal in the womb of its mother”, ’Ibn Al-’Athīr Al-Jazarī (, vol.1, p.441), Al-Shawkānī (, vol.5, p.147).

⁸There are a number of narrations in this regard. Among them is the narration of ’Abd Al-Razzāq in his *Musannaf* on the authority of ’Ibn ‘Umar that the Prophet (pbuh) prohibited the sale of the sperm and eggs of camels, and the unborn animal in its mother's womb. What is meant by the sale of sperm of the camel is to let a male camel copulate with a female camel, and to sell whatever it delivers to the buyer, and what is meant by the sale of a female camel's egg is the sale includes those before or after fertilization by a male camel. Those types of sales were common before the advent of Islam (i.e. in *jāhiliyya*).

⁹This is a *Hadīth marfu‘ musnad* narrated by Al-Ṭabarānī in his *Mu‘jam* on the authority of ’Ibn ‘Abbas. It was also narrated by Al-Dāraqṭunī and Al-Bayhaqī in their *Sunan*. See Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.11), Al-Shawkānī (, vol.5, p.149).

¹⁰Ibn ‘Ābidīn ((Hanafi), vol.4, p.113), ’Ibn Al-Humām ((Hanafi), vol.5, p.148). Al-Kāsānī apparently concluded that the sale is not concluded, and what he meant is that it is defective.

'Imām Mālik had a different opinion in both cases. Thus, he ruled for the validity of the sale of milk for a specified number of days in the udder of a herd of sheep whose milk is homogeneous and whose productivity is known, but not that which is in the udder of one sheep. The ruling is that such a sale is similar to the sale of the milk in the breast of a wet-nurse to feed an infant for a known period. Moreover, it is common practice for people to give others the rights to the milk of a cow for a month or more by making it publicly available or giving it as a gift. He also ruled that it is valid to sell wool on the backs of sheep since it is observable and deliverable.

There is an opinion among the Ḥanbalīs that agrees with this ruling, stating that it is valid to sell wool on the backs of sheep provided that it is sheered immediately, since its delivery can be verified. The Zāhirīs agreed with the validity of selling wool on the backs of sheep.¹¹

Ḥanbalī opinions regarding the sale of non-existent objects

'Ibn Al-Qayyim and his teacher 'Ibn Taymiya permitted the sale of items that do not exist at the time of the contract if their future existence is known according to custom. They base their opinion on the lack of any prohibition of the sale of that which is not mentioned in the Qur'ān, the *Sunnah*, or the talk of the companions of the Prophet (pbuh). What was narrated in the *Sunnah* is the prohibition of sales with excessive risk and uncertainty (*gharar*), where the object may be undeliverable, whether it exists or not (e.g. a runaway horse or camel). Thus, the wisdom in the prohibition is neither existence nor lack thereof.

On the contrary, Islamic law has explicitly permitted the sale of non-existent items in some cases. Examples of such permissions apply for fruits when their quality is beginning to appear, and seeds after they start to sprout. It is clear that contracts in this case apply to existing objects as well as to those that are non-existent before their realization. Thus, the sale of a non-existent object is forbidden if there is ignorance about its future existence. This prohibition is based on excessive risk and uncertainty (*gharar*), and not based on the lack of existence.

4.2.2 Sale of undeliverable goods

The majority of Ḥanafī scholars apparently agree that the sale of an item that is undeliverable at the time of contract is not concluded. This applies even if the item is owned by the seller, e.g. a bird that flew away from its owner, a run-away slave, or gleanings. In this case, the sale is invalid. Even if the object were to

¹¹ Al-Sarakhsī (1st edition (Hanafī), vol.12, p.194 onwards, vol.13, p.23), 'Ibn Al-Humām ((Hanafī), vol.5, pp.139,148), Al-Kāṣānī ((Hanafī), vol.5, p.192), 'Ibn 'Abidīn ((Hanafī), vol.4, pp.106,112,113), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, pp.147,157), Al-mīzān (vol.2, p.67), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.30), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.262), 'Ibn Qudāmah (, vol.4, p.208 onwards), Al-Šan‘ānī (2nd printing, vol.3, p.32 onwards), 'Ibn Juzayy ((Mālikī), p.256), 'Ibn Hazm (, vol.8, p.458).

appear after the contract, the offer and acceptance would have to be renewed, unless they agree on the spot, in which case it becomes a change-of-hands sale.

If the object of sale becomes deliverable during the sales session, the sale that occurred while the object was undeliverable does not become valid. This is based on the fact that the sale when it was originally conducted was deemed invalid. However, Al-Karkhī and Al-Tahāwī ruled that it becomes valid in this case.

If the object of sale is a bird that flew away but is accustomed to return (e.g. domesticated pigeons), then the apparent ruling is that it is not valid to sell since it is not deliverable immediately. Some of the Ḥanafīs ruled that if the bird is accustomed to returning to its home, and can be captured without excessive effort, then it is valid to sell, otherwise it is not.

Similarly, the contract is invalid if the undeliverable item is designated as a price; since the price if identified as a non-fungible becomes an object of sale from its owner's point of view.¹²

The Mālikīs ruled that the purchases of run-away camels, wild cows, and usurped objects by other than the usurper, are not concluded.

The Shāfi‘īs and Hanbalīs ruled that it is not valid (i.e. not concluded) to sell undeliverable objects such as birds in the sky, fish in a sea, ocean, or river, run-away camels, lost horses, usurped property, or runaway slaves whether or not their whereabouts are known. The same applies to the sale of a house

¹² Al-Karkhī, may Allāh's mercy be on him, ruled that if the sale of a run-away slave is concluded. Then, if he appears and is delivered, the sale becomes valid and does not require renewal of the sale. His proof is that running away does not void the property rights of the owner. Thus, the sale is not executed immediately due to the impossibility of delivery, but once delivery is possible, the sale is executed. This is similar to the sale of a usurped item in the possession of the usurper, which the owner may sell to a third party. In this case, the sale is concluded but suspended pending delivery.

The apparent story is that the deliverability of the object of sale is a condition of contract conclusion, which may not be concluded without a benefit to its parties, and such a benefit is not present. At the time of the sale, the object of sale is undeliverable, and there is doubt whether or not the object will become deliverable in the future. In this case, the rule is that the contract that would not be concluded with certainty would not be concluded with a probable benefit. This is different than selling the usurped object to a third party, which is concluded and suspended pending delivery. Thus, if delivery takes place, the sale is executed. In this case, the owner has the ability to deliver the object by resorting to the powers of the government, the judicial system, and Muslim society. The lack of immediate executability of the contract is caused by the usurper. This obstacle to execution is removed by delivery. In the case of a run-away slave, delivery is impossible for an indefinite period, like the sale of flying birds or fish in a sea, ocean or river. See Al-Kāsānī ((Hanafi), vol.5, p.147 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, p.199), 'Ibn 'Abidīn ((Hanafi), vol.4, p.112), Al-Tahāwī ((Hanafi), p.82), *Al-'Amwāl wa Nazariyyat Al-'Uqūd* by Professor Muhammad Yūsuf Mūsā (p.314).

The Mālikīs ruled that the sale of a runaway slave is not valid as long as his whereabouts are not known, or if it is known that he is with someone from whom it is difficult to obtain him. However, if his whereabouts are known to the buyer and seller, and he can be returned, then the sale is valid. 'Ibn Rushd said: I suspect that he (i.e. 'Imām Mālik) made it a condition that his whereabouts are known, and that the price is not taken by the seller until the buyer takes possession of the object of sale ('Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.156), Al-Dardīr ((Mālikī) A, vol.3, p.11). I have discussed the rulings regarding run-away slaves to study this historical situation.

or land under the control of an enemy.¹³ This is based on the prohibition by the Prophet (pbuh) of the “pebble sale” and the sale including excessive risk and uncertainty (*gharar*),¹⁴ and the sale thus discussed fits the definition of *gharar*. It is narrated on the authority of 'Abu Sa'īd Al-Khudriy (mAbpwh) that the Messenger of Allāh (pbuh) has forbidden the purchase of a run-away slave, the purchase of unborn animals in their mothers’ wombs, the purchase of the milk in an animal’s udder, and the purchase of spoils of war prior to their distribution.¹⁵ On the authority of 'Ibn Mas'ūd, it is narrated that the Messenger of Allāh (pbuh) said: “Do not purchase fish in the water, for it is *gharar*”. Thus, he (pbuh) based the prohibition of buying fish in the sea, ocean, or river, on the basis of its being *gharar* (i.e. containing excessive risk and uncertainty). Thus, it is inferred that *gharar* includes the sale of items that are not deliverable. The water mentioned in this *Hadīth* refers to uncontaminated water, e.g. waters of a sea or river. However, if the water is contained (say in a pond), then the Ḥanafis, Shāfi‘is, and Ḥanbalis ruled that fish in such water may be sold if it is accessible without fishing or special tricks. The Ḥanafis added that the buyer has the option to void the sale if visual inspection is unfavorable. The Mālikis, on the other hand, prohibited the sale of fish in a pond or creek.¹⁶

In summary: the four schools of jurisprudence agree on the invalidity of sales of undeliverable items, with few disagreements on conditions, and opinions that are deemed weak in the various schools.

The Zāhirī scholars ruled that deliverability of the object of sale is not a condition of validity of the sale. The condition as they see it is that the seller does not present an obstacle between the buyer and what he buys.¹⁷

4.2.3 Sales of liabilities (including debts)

Liabilities¹⁸ include: the price of a purchased object, the compensation for a loan, dowry before or after the consummation of a marriage, wages compensat-

¹³Al-muhaḍḍhab (vol.1, p.263), 'Ibn Qudāmah (, vol.4, p.200 onwards), Marī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.10).

¹⁴Narrated by Muslim, 'Aḥmad, 'Abu-Dāwūd, Al-Tirmidhī, Al-Nasā'ī, and 'Ibn Mājah on the authority of 'Abu Hurayra “that the Prophet (pbuh) prohibited the sale of the pebble and the sale of *gharar*”, authenticated above. The pebble sale is in saying “I sold you whichever dress this pebble falls upon” and tossing the pebble. See 'Ibn Al-'Athīr Al-Jazarī (, vol.1, p.441), Al-Shawkānī (, vol.5, p.147).

¹⁵Narrated by 'Ahmad and 'Ibn Mājah as the narration of Shahr ibn Hawshab on the authority of 'Abu-Sa'īd Al-Khudriy with the text: “The Prophet (pbuh) has forbidden the purchase of the unborn animal in its mother's womb, the sale of the milk in its udder without measurement, the purchase of spoils of war prior to their distribution, the purchase of charities prior to their receipt, and the purchase of the catch of a diver”. Al-Shawkānī (, vol.5, p.149).

¹⁶Al-Kāṣānī ((Hanafi), vol.5, p.295), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.156), 'Abū 'Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.263), 'Ibn Qudāmah (, vol.4, p.202).

¹⁷'Ibn Hazm (, vol.8, p.449 onwards), 'Uṣūl Al-Buyūc Al-Mamnūc (p.130).

¹⁸Note that liabilities in modern secular laws are: obligations on individuals. This includes liabilities discussed by Islamic jurists, as well as non-fungible items that are identified and must be delivered.

ing for a benefit, indemnity ('arsh)¹⁹, fines for destruction of property, financial compensation for divorce at the instance of the wife, and the object of a deferred sale. The sale of a liability may be: (i) to the liable person, or (ii) to a third party. In both cases, the sale may be: (i) with deferred price, or (ii) in return for immediate monetary compensation.

Sale of liabilities with a deferred price

This is the sale of debt for debt, which is prohibited, since the Prophet (pbuh) has forbidden it “*Nahā (sA^cws) “an bay*’i l-kāli’i bi-lkāli’”*.²⁰ It has been reported that the jurists unanimously agree on the invalidity of a sale of one debt for another, whether the debt is being sold to the debtor or to a third party.*

An example of a sale of debt to the debtor is for one person to buy a measure of wheat for a unit of currency, with the provision that both the object of sale and the price would be delivered in a month (i.e. modern forward and futures contracts). Another example is a forward sale, where the seller is unable to deliver his obligation at the specified term and asks the buyer to sell him the object for another term with an increase. In this case, if the buyer agrees to sell him as proposed, without an exchange of object of sale and price, then this becomes a form of the forbidden usury (*ribā*). This is the form of *ribā* falling under the general category of “give me more time, and I compensate you with more value”. However, if he sells the debt in a different manner, as in selling him the amount for which he is liable for furniture or a rug for example, or for an amount of money paid by the debtor, then the sale is valid since it constitutes a consensual resolution of conflict.

An example of selling a debt to a party other than the debtor is when a man sells a measure of wheat owed to him by a third party for an amount of money due from the buyer after a specified period of time,²¹ or for a present non-fungible commodity. In this case, the sale is not valid, since the object of sale is not deliverable.

Sale of debt

Jurists disagreed with regards to this type of sale as detailed below.

¹⁹Indemnity ('arsh) refers to a financial compensations for physical injuries inflicted on another

²⁰Narrated by Al-Dāraqutnī on the authority of 'Ibn 'Umar, and authenticated by Al-hākim using the method of Muslim, and narrated by Al-Ṭabarānī on the authority of Rāfi' ibn Khadīj, however, its chains of narration relied on one narration by Mūsā Ibn 'Ubayda Al-Rabdhī, and there it is discussed elsewhere (Al-Shawkānī (, vol.5, p.156)).

²¹Al-Šan^cānī (2nd printing, vol.3, p.45), Al-Shawkānī (, vol.5, p.156), *Al-Sharḥ Al-Kabīr* (vol.3, p.61 onwards), *Al-Gharar wa 'Atharuhu fī Al-^cUqūd* by Dr. Al-Ṣiddīq (p.311 onwards), Mar'i ibn Yūsuf (1st printing (Hanbalī), vol.2, p.58), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.262).

1. Selling debt to the debtor

The majority of jurists from the four schools have ruled as valid the sale of debt to the debtor, or forgiving it as a gift. This follows since what invalidates the sale of debt for debt is the inability to deliver, which is not needed in this context since the liability of the debtor is given to him.²² An example of this transaction would be where a creditor sells to the debtor his debt in return for another debt denominated in a different numeraire. In this case, the sold debt is dropped, and its compensation becomes a liability. This is considered a consensual resolution of a dispute, which is allowed based on what was narrated by the five ('Ahmad and 'Aṣḥāb Al-Sunan) on the authority of 'Abd Allāh ibn 'Umar (mAbpw) who said: "I came to the Prophet (pbuh) and said: I sell camels in Al-Baqī', with the price denominated in gold coins, and collected in silver coins; and sell them denominated in silver coins collecting in gold coins". He (pbuh) said: "There is no harm if you take it at its spot price, as long as you do not depart without fully concluding the transaction". This exchange of silver coins for gold coins, and vice versa, is a sale of a liability in exchange for an identified object paid by the debtor. This follows from his saying "I sell at a price denominated in gold coins" that makes it a liability, since he did not receive the gold coins. Then, he exchanged those uncollected gold coins for received silver coins.

The Zāhirīs ruled that it is invalid to sell a debt to the debtor due to the incidence of *gharar*. 'Ibn Ḥazm ruled that this is the sale of an unknown, whose specific characteristics are not observed, which is an unlawful devouring of others' wealth.²³

2. Selling debt to a third party

The Ḥanafīs and Zāhirīs ruled that since it is not valid to sell an undeliverable item, the sale of a debt by a person other than the debtor is not concluded. This follows since the debt is not deliverable by any potential seller other than the debtor himself. The debt is a legal claim of the creditor and a liability on the debtor, or - in other words - it is the act of changing possession of the money and its delivery; and such rights and acts are not deliverable. Even if a condition of delivery by the debtor is included in the sale, it is still not valid, since the seller in this case puts a condition of delivery by a person other than himself, which makes this a defective condition, thus rendering the sale defective due to the undeliverability of the object of sale.²⁴

Some of the Shāfi'īs ruled²⁵ that it is valid to sell a confirmed debt at maturity (*al-dayn al-mustaqrīr*)²⁶ to the debtor or a third party before receipt. In

²²Al-Kāsānī ((Hanafi), vol.5, p.148), 'Ibn 'Ābidīn ((Hanafi), vol.2, p.326), Indian Authors ((Hanafi), vol.4, p.365), '*Uṣūl Al-Buyūc Al-Mamnūcā* (p.111), 'Ibn Qudāmah (, vol.4, p.120).

²³'Ibn Ḥazm (, vol.9, p.7 onwards), '*Uṣūl Al-Buyūc* (ibid.).

²⁴Al-Kāsānī ((Hanafi), ibid.).

²⁵Abū-'Ishāq Al-Shūrāzī ((Shāfi'ī)), vol.1, p.262 onwards).

²⁶Such is a loan whose repayment is certain, with no possibility for default.

this case, deliverability is apparently satisfied without any impediments. Examples of such confirmed and matured debts are: compensation for destroyed property, and monies in the possession of the borrower.

If the liability is not confirmed or not currently due (*ghayr mustaqirr*), then (i) if it is the object of a forward sale (*salam*), then it is not valid to resell it prior to receipt. This follows from the general prohibition of selling what one has not received, and since the object of a deferred sale is not certain to be delivered. (ii) If the liability is a price in a sale contract, then one Shāfi‘ī opinion is that it may be resold prior to receipt. This is based on a narration by ‘Ibn ‘Umar that the Messenger (pbuh) said: “There is no harm as long as you do not depart with unfinished business between you”.²⁷ Also, in this case there is no danger of voiding the contract based on the perishing of the object of sale, thus simulating reselling the object of sale after receipt. On the other hand, there is a consensus that the sale of a debt in exchange for a deferred debt is not valid in monies, foods, and other properties that can result in *ribā*. The discussion above may not be used as a basis for any argument that would contradict clear and unequivocal legislation. Al-Nawawī in *Al-Minhāj* ruled that the most apparent ruling is that the sale of a debt to any party other than the debtor is invalid.

The Hanbālīs ruled that it is valid in their school to sell a confirmed and matured debt to the debtor, e.g. repayment of a loan or payment of dowry after consummation of the marriage. It is not valid in their school to sell a debt to any party other than the debtor. Moreover, it is not valid to give it as a gift to any party other than the debtor, since a gift necessitates the existence of an identified object (the gift), which is not available in this case. It is not valid to sell a debt prior to its due date such as the rental of a property prior to the time the rent is due, the dowry of a woman prior to consummation of the marriage, or the object of a forward sale (*salam*) prior to receipt. However, ‘Ibn Al-Qayyim allowed the sale of a debt to both the debtor and a third party.²⁸

The Mālikīs ruled that it is valid to sell a debt to a party other than the debtor under eight conditions that distance the sale from *gharar*, *ribā*, and other prohibited sales such as selling food prior to its receipt. Those conditions can be summarized under two headings:

1. The sale must not violate a legal prohibition such as *ribā*, *gharar*, etc. Thus: (i) the debt must be an item that may be resold prior to receipt (e.g. in the case of loans) and the object of the debt must not be food; (ii) the price of the sale must be paid currently to avoid selling a debt for another debt; (iii) the price must either be of a different genus than the

²⁷Narrated by Al-Tirmidhī and others, and authenticated by Al-Hakīm following the conditions of Muslim, and the story is well known: ‘Ibn ‘Umar said: “I used to sell camels in Al-Baqī‘ denominated in gold coins and collected in silver coins, and denominated in silver coins and collected in gold coins”, the Messenger of Allāh (pbuh) said: “There is no harm in this, as long as you not depart with any unfinished business between you”.

²⁸Ibn Qudāmah (, vol.4, pp.120,301), Mar‘ī ibn Yūsuf (1st printing (Hanbālī), vol.2, p.80 onwards), ‘Ibn Qayyim Al-Jawziyyah ((Hanbālī), vol.1, p.388 onwards), Al-Buhūtī (3rd printing (Hanbālī), vol.4, p.337).

debt, or - if it is of the same genus - equal to it to avoid *ribā*; (iv) the price must not be gold if the debt is silver to avoid selling money for deferred money (*ribā*). Those are four conditions under one heading.

2. (i) The repayment of the debt must be most likely, e.g. the debtor should be present in the city where the contract is conducted so that his financial condition would be known. (ii) The debtor must acknowledge the debt so that he may not deny it later. Thus, it is not valid to sell a right under dispute. (iii) The debtor must be eligible to take responsibility for the debt (e.g. he may not be underage or under legal supervision), thus the debt may be deliverable. (iv) There should be no enmity between the debtor and the buyer of the debt so that the buyer would not be exposed to an additional risk, and so that the debtor will not be subjugated to an adversary.²⁹ Those are four other conditions under one heading.

We find that the Mālikī school is the best in this regard. In general, it is not valid to sell a debt for a debt, as in selling a debt to a third person with a deferred price. Also, it is not valid for a debtor to settle a debt with another debt; e.g. a debtor may not repay the creditor with fruits to be reaped, or a house in which he may dwell, since the receipt of such items would be deferred.³⁰

Discounted IOUs: The Ḥanafīs ruled that the sale of an IOU to a party other than the debtor (or a person who owes the government money) at a discounted price is not valid.³¹

4.2.4 *Gharar* sales:

The term *gharar* literally means danger, and the source term *al-taghrīr* refers to exposure to danger. The linguistic origin of the term *gharar* refers to items with a likeable appearance and disliked reality. Thus, our life on earth has been called in the Qur'ān "maṭā'u al-ghurūr" (utilities of *ghurūr*), i.e. deceptive. Thus, *gharar* is exposing oneself or one's property unwittingly to the possibility of perishing. *gharar* sales literally refers to the existence of *gharar* either in the nature of the sale itself, or in the object of sale.³² Thus, a sale may qualify as a *gharar* sale if the object of the sale is what qualifies as *gharar* (e.g. selling birds in the air or an [unspecified] sheep from a herd), or if the *gharar* is intrinsic to the language of the sale (e.g. two sales in one, two conditions in a sale, down-payment sales, pebble sales, etc.).

Al-gharar lexically refers to deception, where a necessary condition for acceptability may and may not exist. Thus benefiting from such contract qualifies

²⁹ Al-Dardīr ((Mālikī)A, vol.3, p.63), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.146), 'Ibn Juzayy ((Mālikī), pp.210,289), 'Uṣūl Al-Buyūc Al-Mamnūc a (p.109), *Al-Gharar wa 'Atharuhū fī Al-'Uqūd* (p.315).

³⁰ Ibn Juzayy ((Mālikī), p.289).

³¹ 'Uṣūl Al-Buyūc Al-Mamnūc a fī Al-Shari'a Al-'Islāmiyya wa Mawqif Al-Qawāniḥ Minhā by Professor 'Abd Al-Samī' Imām (p.120).

³² See *Al-Gharar wa 'Atharuhu fī Al-'Uqūd* by Dr. Al-Ṣiddīq Al-'Amīn (p.62).

as invalid acquiring of property.³³ In jurisprudence, the term *gharar* refers to purposive cheating and deception as well as ignorance of the object of sale and undeliverability of the object. Al-Şanā'ī said that a *gharar* sale may occur in a number of forms: through undeliverability of the object of sale (e.g. a run-away horse or camel), non-existence or ignorance of the object of sale, lack of full ownership of the object by the seller (e.g. fish in large volumes of water [i.e. in a sea, ocean, river, etc.]), or any of a number of other forms.³⁴

Gharar in the language of jurists:

Jurists of various schools have given somewhat similar definitions of *gharar* among which are the following:

- Al-Sarakhsī said for the Ḥanafī school: *gharar* is that whose consequences are hidden.³⁵
- Al-Qarāfi said for the Mālikī school: *gharar* is what is not known to exist in the future, e.g. birds in the air and fish in the water.³⁶
- Al-Shīrāzī said for the Shāfi'i school: *gharar* is that whose nature and consequences are hidden.³⁷
- Al-'Isnawī said for the Shāfi'i school: *gharar* is that which admits two possibilities, with the worse consequence being the more likely.³⁸
- 'Ibn Taymiya (of the Ḥanbalī school) said: *gharar* is that whose consequences are unknown. His student 'Ibn Al-Qayyim said: It is that which is undeliverable, whether it exists or not (e.g. the sale of a run-away slave or a run-away camel, even if they exist).³⁹
- 'Ibn Hazm (of the Zāhirī school) said: *gharar* is where the buyer does not know what he bought, or the seller does not know what he sold.⁴⁰

In summary: the *gharar* sale is any sale that incorporates a risk that affects one or more of the parties to the contract and may result in loss of his property.⁴¹ Professor Al-Zarqā' defined it thus: It is the sale of probable items whose existence or characteristics are not certain, due to the risky nature that makes it similar to gambling. The type of *gharar* that invalidates a sale is that which pertains to the existence of the object of sale (*gharar al-wujūd*), which may and may not exist. As for *gharar* pertaining to the attributes of the object of sale (*gharar al-waṣf*), it corrupts the sale, as we have seen in the conditions

³³ Al-Şanā'ī (2nd printing, vol.3, p.15).

³⁴ ibid., 'Ibn Juzayy ((Mālikī), p.256).

³⁵ Al-Sarakhsī (1st edition (Hanafī), vol.12, p.194).

³⁶ Al-Qarāfi ((Mālikī), vol.3, p.265).

³⁷ 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.262).

³⁸ *Nihāyat Al-Ūl Sharḥ Minhāj Al-'Uṣūl* (vol.2, p.89).

³⁹ 'Ibn Qayyim Al-Jawziyyah ((Hanbalī), vol.2, p.9), 'Ibn Taymiyah ((Hanbalī), vol.3, p.275).

⁴⁰ 'Ibn Hazm (, vol.8, p.396).

⁴¹ *'Uṣūl Al-Buyūc Al-Mamnū'a* (p.130).

of validity.⁴² Therefore, *gharar* is risk in the sense of lack of certainty regarding the existence of an object. The *gharar* sale is consequently: the sale of (i) that which is not known to exist or not, (ii) whose measure is not known to be large or small, or (iii) that is undeliverable.

A note on definitions: The Zāhirīs restricted *gharar* to that which is unknown, and some of the Ḥanafīs restricted it to that the existence of which is not known but excluded the unknown from the definition. The best definition in the view of most jurists is that *gharar* incorporates that whose existence is not known, and that that is itself unknown.⁴³ Thus, the definition of Al-Sarakhsī is the best one: that whose consequences are hidden.

The status of *gharar* sales:

'Imām Al-Nawawī said: the prohibition of *gharar* sales is a fundamental part of Islamic Law, under the topic of which many issues may be included. Two items are to be excluded from the topic of *gharar* sales:

1. Items that are included as part of a sale, and that may not be sold separately (e.g. the foundation of a house, or milk in the udder belonging to an animal).
2. Items that are customarily tolerated, either due to its insignificance, or the difficulty of identifying (e.g. the fees for using a bathroom where the amount of water used in the bath may vary, drinking from private waters, and the amount of cotton used in the lining of a garment).⁴⁴

Jurists agreed that *gharar* sales are not valid: e.g. the sale of milk in an udder, wool on the back of sheep, pearls in their shells, unborn animals in the womb, fish in the water (sea, river, etc.) prior to catching them, birds in the air prior to hunting them, and the sale of another person's property on the understanding that he will buy it and then deliver it (i.e. selling what the seller will own prior to owning it, since the seller would have sold what he does not own at that time). This applies whether the *gharar* pertains to the object of sale or to the price.

Among the sales that are deemed not valid due to *gharar* are the following: the sale of the sperm and eggs of camels, the touch sale (*al-mulāmasa*), the sale of discarded items (*al-munābadha*), and the pebble sale (*bay^c al-haṣāh*).⁴⁵

⁴² Al-Madkhal Al-Fiqhī Al-^cĀm (vol.1, p.97), ^cAqd Al-Bay^c (p.20).

⁴³ Al-Gharar wa 'Atharuhu fī Al-^cUqūd (p.33 onwards).

⁴⁴ Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.9, p.280 onwards), Al-Shawkānī (, vol.5, p.148), *Qawā'id Al-'Ahkām* by Al-^cIzz ibn ^cAbd Al-Salām (vol.2, p.76).

⁴⁵The sales of camel eggs and sperm has been discussed above. The touch sale is: "I sold you this dress as soon as you touch it", or "if you touch it", or "whichever dress you touch", "then it is yours". The discarded item sale is: "I sell you this item if (or when, or whichever dress) I discard it for such and such". The sale of the pebble is similar to lotteries nowadays: "throw this pebble, then whichever dress it falls upon is yours", or "I sold you this land to the farthest point to which you throw the pebble". *gharar* incorporates all of those sales since they were explicitly forbidden in *Hadīth* due to their common usage prior to Islam. Al-Ṣan^cānī (2nd printing, vol.3, p.15), Mar^cī ibn Yūsuf (1st printing (Ḥanbālī), vol.2, p.11). The Ḥanafīs understood those three sales by interpreting the touch as a proof of the sale being binding, whether the buyer knows the object of sale or not. Later interpreters indicate that the touch

Not valid also are the sale of the catch of a future fishing or hunting attempt (e.g. “I sell you whatever fish my net will catch in one throw for so-much”), or a dive (e.g. “I sell you however many pearls I get in my next dive for so-much”).⁴⁶ Thus, the object of sale in all five cases is unknown either in nature or in measure, and the prohibition of those sales is well documented in *Hadīth*, and they are among the pre-Islamic (*jāhili*) sales.

Among the non-valid sales also is *bay’ al-muzābana*, which is the sale of dates or grapes on a palm tree or vine in exchange for cut dates or raisins assumed (or guessed) to be of equal volume. Also, *bay’ al-muḥāqala* is not valid: that is the sale of wheat in its spikes in exchange for wheat kernels assumed to be of equal volume. The Prophet (pbuh) “forbade *al-muzābana* and *al-muḥāqala*.⁴⁷ Those sales are deemed not valid due to the inclusion of *ribā* induced by ignorance of the volume of the sold object. This follows from the well known requirement that trading of commodities amenable to *ribā* must be of known equal quantities. Accounting for needs, the Shāfi‘is, Ḥanbalis, Zāhiris, and the majority of Mālikis have allowed an exception in the case of *bay’ al-‘arāyā*.⁴⁸ For the Shāfi‘is, this type of sale covers the sale of dates on a palm tree of estimated volume, in exchange for a measured quantity of dates on the ground. It also includes the sale of grapes of an estimated quantity on the vine in exchange for a measured quantity of raisins of 653 kilograms or less.⁴⁹ The non-Mālikī jurists added a condition that the exchange is completed in the sale session. This decision is based on the Prophet’s (pbuh) prohibition of selling fresh dates in exchange for dried dates, but his allowance of a special case for *al-‘arāyā*.⁵⁰ The Hanafis, on the other hand, have allowed *bay’ al-‘arāyā* only if executed out of necessity. Al-Shawkānī reported that ‘Abu-Hanifa forbade all forms of *bay’ al-‘arāyā*, and restricted it to the case of an intended gift: (Where the owner of an orchard gives

in a touch sale refers to inspection by touch (rather than sight) in cases where that can be useful, as in purchasing clothes. Al-Mirghīnānī defined it as the case wherein two men bargain over a good, then if the buyer touches it, or the seller discards it to him, or the buyer puts a pebble on the item, then the sale becomes binding. Thus, the first is a touch sale, the second is sale of a discarded item, and the third is a pebble sale (‘Ibn Al-Humām ((Hanafi), vol.5, p.196)).

⁴⁶The hunter/fisher is anyone who uses a tool to catch animals or fish on land or in the sea (*al-qānis*). The diver (*al-ghā’is*) is one who dives into the sea to extract pearls or other materials. The prohibition of selling the catch from one future dive was narrated in a *Hadīth* on the authority of ‘Abu-Sa‘īd Al-Khudri (Al-Shawkānī (, vol.5, p.148)).

⁴⁷Narrated by Al-Bukhārī and Muslim based on the *Hadīth* of Jābir ibn ‘Abd Allāh and ‘Abu-Sa‘īd Al-Khudri, also narrated by Al-Bukhārī based on the *Hadīth* of ‘Ibn ‘Abbās and ‘Anas. Muslim also narrated it based on the *Hadīth* of ‘Anas. See Al-Hāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.12 onwards), Al-Shawkānī (, vol.5, p.198 onwards).

⁴⁸*Al-‘arāyā* is the plural of the Arabic word *‘urya*, which refers to a palm tree the dates of which are given to another for a fixed period of time.

⁴⁹The Ḥanbalis and Zāhiris have restricted *bay’ al-‘arāyā* to dates, excluding grapes, whereas Mālik allowed it for all agricultural products that are dried and stored, such as walnuts and figs.

⁵⁰Narrated by Al-Bukhārī and Muslim based on the *Hadīth* of Sahl ibn ‘Abī Ḥathma, and reported by Al-Shaykhānī based on the *Hadīth* of ‘Abu Hurayra that the Messenger of Allāh (pbuh) has allowed *bay’ al-‘arāyā* in quantities less than five *‘awsaq* (equivalent to approx 653 kg), meaning the sale of fresh dates in exchange for aged dried dates. See Al-Hāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.13), Al-Shawkānī (, vol.5, p.200).

as a gift to another man the produce of a known group of date palms, then felt uncomfortable at the thought of this individual frequenting his orchard. Then, he may buy back from him the fresh dates on the palm in exchange for dried dates that he pays currently in an amount estimated to be equal to the fresh dates on the palm.)⁵¹

We notice that those sales that are deemed non-valid due to *gharar* subsume some that are invalid, and some that are defective (in the sense of the Ḥanafī jurists). Those that are only defective are: the sale of the catch of a hunter or diver, *al-muzābana*, *al-muḥāqala*, the touch sale, *al-munābadha*, the pebble sale, and the sale of an identified item out of many, due to the resulting ignorance. The other non-valid sales are also invalid.⁵² Thus, the sale of the sperm of he camels and eggs of she camels, and the unborn animal in its mother's womb, are invalid due to the prohibition by the Prophet (pbuh), and due to its inclusion of *gharar* as shown above in the discussion of selling non-existent objects.

The proof of the non-validity of *gharar* sales in general is that the Prophet (pbuh) prohibited the pebble sale and sales of *gharar*. 'Ibn Mas'ūd narrated that the Prophet (pbuh) said: "Do not buy fish in the water, for it is *gharar*".⁵³ This prohibition is further based on: (i) the undeliverability of the object of sale, (ii) the existence of invalidating ignorance of the object of sale and its quantity, and (iii) the lack of ownership by the seller at the time of the contract.

Minor *gharar*: *gharar* and ignorance may be classified into three groups:⁵⁴ (i) substantial and unanimously prohibited (e.g. birds in the sky), (ii) minor and unanimously allowed (e.g. the foundation of a house, or the cotton lining of an overcoat), and (iii) intermediate with differing opinions. The Ḥanafīs allowed sales that include minor *gharar* such as the sale of nuts, beans, rice, sesame, wheat, watermelon, and pomegranate in their shells, conditional on giving the buyer the option of inspection (as discussed below in the section dealing with this option).

The Mālikīs and Ḥanbalīs permitted all sales containing minor *gharar*, and those that are deemed necessities, as discussed above.

The Shāfi'īs, on the other hand, allowed the sale of such items in their inner peals. They have two opposite opinions on their sales in their outer shells. Al-Nawawī, Al-Baghwī, and Al-Shīrāzī ruled that sales in the outer shells is not valid. 'Imām Al-Haramayn and Al-Ghazālī ruled that it is valid, based on the story that Al-Shāfi'ī (mAbph) ordered someone to buy fresh green beans for him, as well as the agreement on such practices in all countries.⁵⁵

⁵¹ Al-Shawkānī (, vol.5, p.201), Al-Tahāwī ((Hanafī), p.78).

⁵² Some writers confused the issues by including the sale of birds in the sky and fish in the water prior to catching among defective sales in the Ḥanafī schools. The correct statement is that those sales are invalid, since they constitute sales of what is not owned at the time of the sale, c.f. 'Ibn ^cĀbidīn ((Hanafī), vol.4, p.111 onwards), ^cAbd Al-Ghanī Al-Maydānī ((Hanafī), vol.2, p.25), *Al-Gharar wa 'Atharuhu fī Al-^cUqūd* (p.347).

⁵³ Sources for those two *Hadīths* were provided above.

⁵⁴ Al-Qarāfī ((Mālikī), vol.3, p.265).

⁵⁵ See the jurists' study of *gharar*: Al-Sarakhsī (1st edition (Hanafī), vol.12, p.194 onwards), Al-Zayla'ī ((Hanafī Jurisprudence), vol.4, p.45 onwards), 'Ibn Al-Humām ((Hanafī), vol.5, pp.106,191 onwards), Al-Kāsānī ((Hanafī), vol.5, p.147 onwards, 294), 'Ibn ^cĀbidīn

I favor the validity of all such sales as ruled by the Mālikīs and the Hanbalīs due to the commonality of such sales. If a defect is found, the sale may be voided based on the option of detecting a defect.

Legal status of insurance

Insurance is a new industry that first appeared in its true form in the fourteenth century C.E. in Italy, mainly in the form of marine insurance. There are two main types of insurance: (1) cooperative (mutual) insurance, and (2) insurance in exchange for fixed payments.⁵⁶

Cooperative (mutual) insurance: takes place when a group of individuals agree each to pay a given amount to compensate for losses that may occur for any of them. This kind of insurance is rare in everyday life.

Insurance in exchange for fixed installments: is where the insured is required to pay fixed installments to the insurer. The insurer is typically an insurance company comprised of invested partners. The insurer is thus required to pay a defined financial compensation to the insured in the event of occurrence of a particular type of loss. The compensation may be paid to a specified person, or to the insured individual or his heirs. It is thus an commutative contract binding on both parties. This is the prevalent type of insurance today.

The difference between the two types of insurance is that the insurer in the former case is not an institution separated from the insured. Moreover, the members of the insurer organization are not seeking to make profits, but only to reduce the losses that affect some of them. On the other hand, the insurance in exchange for fixed installments is implemented by an insurer that is a profit-seeking corporation. Such profits are made at the expense of the insured. Even though the insured may not collect any monies from the insurance companies, it is still a commutative contract. Indeed, it is in the nature of contingency contracts that some parties may not receive compensations in certain cases.

Status of cooperative insurance

There is no doubt that cooperative insurance is valid in Islam, since it is classified as a donation contract. It qualifies as cooperation to do good, since each participant willingly pays his share to reduce the losses that may befall other

((Hanafī), vol.4, pp.111-114), Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.5, p.41), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, pp.151,156,158), Al-Dardīr ((Mālikī)A, vol.3, pp.55-60), 'Ibn Juzayy ((Mālikī), p.256 onwards), Al-Qarāfī ((Mālikī), vol.1, p.150 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.31,90,93), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.263 onwards), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.9, pp.281,374,335), 'Ibn Qudāmah (, vol.4, pp.56,92,201), Al-Suyūtī (b, vol.2, p.125 onwards), Al-Shawkānī (, vol.5, pp.147,200 onwards), Al-Šan'ānī (2nd printing, vol.3, p.15).

⁵⁶See *Al-Ta'mīn fī Al-Qānūn Al-Miṣrī wa Al-Muqāran* by Dr. 'Abd Al-Mun'im Al-Badrāwī (p.36 onwards).

members. This applies to all domains of insurance, including life, physical injury, fire, theft, and accident insurance.⁵⁷

The fatwā of 'Ibn Ābidīn:

'Ibn Ābidīn ruled that marine insurance is prohibited.⁵⁸ This type of insurance guarantees potentially sold goods for traders who import goods by sea. 'Ibn Ābidīn ruled that the trader may not collect from the insurer any compensation for the perished goods, for three reasons:

1. This contract makes binding that which is not legally binding, due to the absence of any of the four justifications of guarantee, which are:
 - (a) Transgression via killing, destruction, burning, etc.
 - (b) Causing damage, for example by digging a well in a public road without permission.
 - (c) Illegal possession, e.g. by usurping, stealing, withholding a sold item from the buyer without legal cause.
 - (d) Surety.

The insurer does not transgress, cause damage, is not in possession of what the insured owns, and there is no identified collateral.

2. Insurance is not equivalent to a guarantee for a depositor against the perishing of his deposit in exchange for a wage. This follows from the property not being in the possession of the insurer, but rather in the possession of the owner of the ship. If the owner of the ship is himself the insurer, then he is a common agent, and not a recipient of deposits. In both cases, the depository and the common agent are not responsible for compensation following an unavoidable accident, such as death, sinking, or fire.
3. Insurance is not equivalent to a guarantee against deception, since the deceiving party must know of the danger, while the deceived party must be ignorant of it. In this regard, the insurance company (insurer) is not intentionally deceiving the merchants (insured). The possibility of the ship sinking, while known to both parties, has a future realization is unknown to both.

However, in the case where the danger is well known by both parties, e.g. the danger of hijacking by pirates, then a guarantee is valid. However, this is no longer an insurance contract. Thus, if one person says to another: take this route, then if someone attacks you, I guarantee your money, the guarantee is valid.

⁵⁷See *Al-Gharar wa 'Atharuhu fī Al-'Uqūd* by Dr. Al-Siddiq Muhammad Al-'Amīn Al-Darīr (p.521 onwards). It is also valid for the purposes of obligatory insurance such as those imposed on vehicle owners. Social insurance of this form are valid as well against disability, old age, sickness, and retirement.

⁵⁸'Ibn Ābidīn ((Hanafi), vol.3, p.273 onwards).

¹Ibn ^cAbidīn also considered the case of a defective insurance contract in the land of war between the insurer and a non-Muslim partner with the insured, or between an insured trader present in a land of war and the insurer. In this case, if the insured takes a compensation for perished goods, and sends it in the former case to the Muslim trader, or if the insured trader collects the compensation in the Islamic country in the latter case, then the most common opinion is that it is valid. This follows since the defective contract was concluded between non-Muslims in a land of war, and the trader has received the compensation with their consent. Then there is no reason not to collect. However, if the contract was concluded in Muslim lands, and the collection was in a land of war, then collecting the compensation is not allowed, even if the non-Muslim agrees. This follows since such compensation is based on a defective contract originating in Muslim lands.

It is not valid to consider insurance a form of silent partnership (*mudāraba*), with one party working and the other financing, for two reasons:

1. The installments and payments paid by the insured become a property of the insurer (insurance company). Thus the insurance company may use such monies anyway it wishes, and the insured loses those monies if no accident befalls him.
2. A condition for the validity of a *mudāraba* is that the profits be shared according to fixed proportions between the financier and the entrepreneur (e.g. one quarter or one third to one party, and the rest to the other). In insurance, however, the insured is often given a fixed percentage interest payment (e.g. 3% or 4%), thus rendering this *mudāraba* invalid. Even if this reason does not apply in a given contract, the first reason remains. Moreover, if the insured dies, the money may not go to his heirs, but rather to the one designated in the insurance contract. This is contrary to the case of death of a financier in a silent partnership (*mudāraba*).

It is not valid to consider insurance a guarantee or surety, due to the absence of the four legitimate reasons for guarantee enumerated above. Also, many insurance contracts do not have an item that may be considered the object of surety (*makfūl*), and even when such an item exists (e.g. in the case of auto accidents), it is unknown.

In fact, the insurance contract is among *gharar* contracts, i.e. its outcomes are probabilistic depending on the existence of the object of contract or non-existence thereof. The Messenger of Allāh (pbuh) forbade *gharar* sales, and an analogy can be made to cover financial commutative contracts. Thus, *gharar* affects such contracts in the same manner it affects sales. Consequently, legislators have included insurance contracts under the heading “*gharar contracts*”, since insurance by necessity deals with future events that may and may not occur. Thus, *gharar* is a necessary component of insurance. Moreover, insurance contracts include a substantial (rather than moderate or low) level of *gharar* since “danger” is one of its cornerstones, and payment depends on a probabilistic

event that is exogenous to the will of the parties to the contract.⁵⁹

The type of necessity that may validate a contract that contains a substantial degree of *gharar* (defined as: a case where if the individual does not engage in the prohibited activity, he will endure severe hardship, but does not perish)⁶⁰ must be: (i) general, i.e. affecting all people; or (ii) special to a particular group of people (e.g. the inhabitants of a village, or members of a guild or union); and (iii) the necessity must be certain, by exhausting all legal venues to satisfy the need before resorting to the ones including substantial *gharar*.

Even if we accept the claim that insurance is a general necessity today, it is not a certain necessity since the same effect can be achieved by means of cooperative insurance that is based on voluntary contributions. This would eliminate the profit-seeking intermediary that exploits the needs of the people. Thus, the insurance contract is a non-necessary financial exchange contract containing substantial *gharar*, which is prohibited in Islam.

Thus, the insured are religiously forbidden from collecting a compensation from the money of an insurance company. This follows since it is money that is not binding on the paying agency, and since the condition of guaranty by a depositary is invalid.

Insurance and re-insurance

Definition: Egyptian law (747) and Syrian law (713), as well as others, have defined insurance as: “A contract that obligates the insurer to pay the insured – or the beneficiary designated in the contract – an amount of money, a regularly scheduled set of payments, or another monetary compensation, in case of an accident or the occurrence of an event stipulated in the contract. The insured on his part makes regularly scheduled payments, or some other payment method, to the insurer”.

This definition clearly refers to the commercial insurance contract between two parties: the insured, and an insurance company. The insured deals with the insurance company by paying regular installments in return for the guarantee to pay a compensation in case the event stipulated in the contract occurs. It is thus one of the probabilistic contracts (i.e. one of the compensations is contingent on events that may and may not occur), as well as a financial commutative contract. Note, however, that it is not necessary in a probabilistic contract that a financial compensation will be paid sometimes, and such a compensation, if paid, would not be considered a voluntary contribution on the part of the insurer.

The definition also makes it clear that insurance is among the *gharar* contracts, since the amounts being paid by the two parties are not known at the contract session. This is the case since an accident may occur immediately after the insured makes the first payment, and the latter may make all the payments without any accidents occurring.

⁵⁹See *Al-Gharar wa 'Atharuhu fi Al-'Uqūd* by Dr. Al-Šiddīq Muhammād Al-'Amīn Al-Đarīr (pp.656,661).

⁶⁰Al-Suyūtī ((Shāfi'ī), p.77, fourth rule).

It is also a contract by mutual consent (*'aqd tarādi*), and binding on both parties. It is moreover, a timed contract (*'aqd muddah*), since time is a crucial factor for the implementation of the commitments of both sides. Finally, it is among the compliance contracts (*'uqūd al-'idhān*), since the insured is subject to conditions and restrictions that are pre-specified by the insurance company.

Types of insurance

In form, there are two types of insurance:

1. **Cooperative insurance:** This is the arrangement whereby a group of individuals each pay a fixed amount of money, then compensation for losses of members of the group are paid out of the total sum.
2. **Commercial insurance, or insurance in exchange for fixed installments:** This is the default form addressed when we use the term “insurance”. In this contract, the insured is bound to pay fixed installments to the insurance company that is a joint-stock company. In return, the insurance company is responsible to compensate the insured for losses caused by events stipulated in the contract. If the stipulated events do not occur, the insured loses his right to the payments he made, and they become property of the insurer.

This latter type of insurance, in turn, may be divided into:

- (a) **Insurance against losses:** This type compensates the insured for losses incurred due to events that befall him. This includes:
 - **Liability insurance:** This would guarantee the insured for his liability towards others who incurred a loss (e.g. traffic accidents, and work-related injuries).
 - **Object insurance:** This would compensate the insured for losses in property (e.g. due to theft, fire, flood, pests, etc.).
- (b) **Insurance of individuals:** that covers:
 - **Life insurance:** In this case the insurer is bound to pay an amount of money to the person of the insured or to his heirs in case of death, old age, disease, or disfigurement, depending on the extent of the injury.
 - **Insurance against bodily injuries:** In this case, the insurer is bound to pay a specified amount of money to the insured in case of injury during the period of the insurance, or to another beneficiary in case of death of the insured.

Insurance can be classified in terms of its generality and specificity into:

1. **Individual insurance:** This would insure the insured against a specific danger.

2. Social or common insurance: This would insure a group of individuals with a common source of income against specific dangers, such as illness, old age, unemployment, or disability. This is typically a compulsory type of insurance that includes social, health, and retirement insurance.

Islamic rulings on insurance

There is no doubt – as shown above – that cooperative insurance is valid from the viewpoint of contemporary Muslim jurists. This follows since it is a voluntary contribution contract, which encourages the type of cooperation that Islamic law requires Muslims to exhibit. Each participant would voluntarily pay his contribution to ameliorate the effects of losses that other participants incur. This would apply to all types of insurance: life, physical injury, or objects (due to fire, theft, or the death of livestock). It also applies to liability insurance against traffic accidents and work-related injury. Moreover, the validity of this contract follows from the fact that it is not motivated by profit-making.

On this basis, cooperative insurance companies in Sudan and elsewhere were established. Those companies have been successful in attaining their objectives despite their characterization by lawyers as “primitive”.

Similarly, obligatory insurance (e.g. auto insurance for injuries inflicted on others) that is legally enforced by the government is valid. This type of insurance is tantamount to tax payments to the governments.

Also valid are forms of government-sponsored social insurance against old age, disability, sickness, unemployment, and reaching the age of retirement. This follows since the government is responsible to take care of its constituents under such circumstances, and since such contracts are devoid of *ribā*, *gharar*, and gambling.

The Second Conference (Cairo, 1965), and the Seventh Conference (1972) of Muslim Scholars, have approved social insurance and cooperative insurance. The Islamic Jurisprudence Council approved this decision in Mecca in 1978.

As for commercial insurance (in return for fixed installments): it is not legally valid. This is the opinion of the majority of contemporary jurists. This is also the opinion endorsed in The First International Conference on Islamic Economics (Makkah, 1976). The reasons such contracts are not valid can be limited to two: *ribā* and *gharar*.

- **As for *ribā*:** No one can deny the existence of *ribā* in this contract since its origin is certainly suspect. This is the case since insurance companies invest all of their monies in *ribā*, and they may even give the insured (in case of life insurance) part of the interest payments accrued to them. *Ribā* is definitely forbidden (*harām*) in Islam.

Those who rule that insurance contracts are valid explicitly reject the investment of insurance companies in *ribā* related instruments. They also do not approve of insured individuals accepting any part of the interest payments paid by insurance companies.

Ribā is clearly effected by the two parties to the contract since there is no equality between the installments paid by the insured and the compensation paid by the insurance company. What the company actually pays may be more, less, or equal to that which is paid by the insured, and equality is very unlikely.

Also, the payments are deferred. Thus, if the compensation was greater than the installments paid by the insured, it would contain surplus *ribā* (*ribā al-fadl*) as well as credit *ribā* (*ribā al-nasi'a*) and if it is equal then it contains *ribā al-nasi'a* alone.

Someone may argue that the insurance contract is based on the foundations of cooperation to ameliorate losses and injuries, and thus contains neither *ribā* nor any resemblance thereof. To this one would answer that the insured sometimes may be seeking *ribā*. Even if he is not seeking it, *ribā* is still present in the compensation by the insurance company since the profits of the latter are accumulated through interest rates and other *ribā*-related transactions.

- **As for *gharar*:** It is clear that the insurance contract is among the *gharar* contracts since it is a probabilistic contract where the object of contract may and may not exist. There is an authentic *Hadīth* in the Prophetic tradition, narrated by the most trusted narrators on the authority of a number of the Prophet's (pbuh) companions: "The Messenger of Allāh (pbuh) has forbidden *gharar* sales".⁶¹ This prohibition extends by analogy (*qiyās*) from sales to all contracts of financial compensation, which are thus affected by *gharar* in the same way.

The insurance contract with a company is one of financial compensation not of voluntary contributions, and thus is affected by *gharar*. As discussed above, *gharar* is a substantial and necessary component of insurance companies since payments by both sides are not known at the time of the contract.

It may be said that insurance companies rely on rigorous calculations that eliminate all possibilities for probabilistic features, all *gharar*, and all chances for injustice, under normal circumstances. However, this does not make insurance permissible, since the removal of *gharar* on the part of the insurance company alone does not eliminate all *gharar* from the contract. It must also be eliminated for the insured before this invalidating reason is removed. Islamic jurisprudence does not look at the entire portfolio of contracts conducted by insurance companies, but rather looks at the status of each contract (in terms of validity or defectiveness) on its own merits.

It may be said that there is no *gharar* or uncertainty on the part of the insured, since the object of sale in an insurance contract is security regardless of dependency on danger, and this object of sale is "received" by the

⁶¹Narrated by Muslim, 'Abu-Dāwūd, Al-Tirmidhī, Al-Nasā'ī, and 'Ibn Mājah on the authority of 'Abu Hurayra (mAbpwh).

insured after paying the first installment. This argument is invalid, since security is the motivation for conducting the contract, and not the object of contract. The object of the contract is that which is paid by the two parties (in this case the insured and the insurer), or one of them. If we say: security is the object of the sale, then the insurance contract would also be invalid, since the object of sale must be possible and not subject to becoming impossible. Of course, it is impossible to assume that providing security can be binding and implemented with certainty.

Also, the object of a commutative contract must be existing at the time of the contract, as evidenced by the *Hadīths* prohibiting the sale of fruits before their quality is evident. The object must also be in a state that allows the parties to utilize it in the manner stipulated in the contract. If the object of insurance did not satisfy those conditions, or if it is non-existent, even if possible to exist in the future, the sale is legally not valid. The object of sale (which is what both parties pay, or what one party pays, e.g. the insurer in case an event occurs) of insurance is not certain to exist.

The type of necessity that would validate a contract that contains a substantial amount of *gharar* has been discussed above. To recap, the contract must be necessary to avoid hardship for some or all of the people, and no legitimate alternative must be available to reach the same end. In this case, the existence of a legal form of insurance (cooperative insurance) that can give the same result makes this need for commercial insurance surmountable (*ghayr muta^cayyin*), and thus invalidates the contract.

Even if we accept the notion that commercial insurance is an insurmountable (*muta^cayyin*) necessity, it would only be valid to the extent that removes that need. This would be following the juristic rule: “Necessity is measured by its degree”.

Another proof of the defectiveness of insurance is the condition that makes *gharar* a corrupting component of the contract. That condition is that the *gharar* be a fundamental part of the contract, which is satisfied in the case of commercial insurance.

Since insurance contains an element of *gharar*, it also contains an element of ignorance and uncertainty (*jahāla*). Ignorance of the two compensations is evident in insurance, since the amount to be paid by the insured and the insurer may increase or decrease. Moreover, the very act of payment by one of the parties (compensation by the insurer) is predicated on an event that may and may not occur. This renders the ignorance substantial and invalidating to the contract.

Knowledge of the amount of money in each scheduled payment/installment does not remove the *gharar* and ignorance, since it is the number of such installments to be paid that is uncertain. The consent of the insurer to pay the compensation if the event (death or otherwise) takes place is also irrelevant, since it is a consent that deviates from the rules of law and its texts that pro-

hibit *gharar*. In this respect, it has the same legal status as consent in gambling or adultery, which does not validate either one.

Since the degree of uncertainty is substantial, it invalidates the contract, even if it does not lead to dispute. It is only minor uncertainty that may not lead to conflict that is excusable. However, the uncertainty in insurance is more substantial than the degree described by jurists as leading to conflict and thus corrupting sale contracts. Such examples included the sale of turnips and carrots in the ground, and those are existent in the ground, but the ignorance still results from not seeing them and knowing their condition. In the case of insurance, the very compensation for losses may and may not exist. This weakens the foundations upon which contracts in general have been validated.

All those objections, and others, do not make it permissible for a merchant or other insured parties to collect compensations for losses from insurance money. This follows since this is money that is not binding on the one who accepted that responsibility, as stated by 'Ibn 'Abidīn. This also follows from the ruling by Hanafi jurists that a condition of guarantee imposed on the trustee (*al-'amīn*) is invalid.

In summary: Commercial insurance (with fixed periodical payments) is prohibited (*harām*) for five reasons.⁶²

1. *Ribā*: Since the insurance compensation includes an increase over the installments paid by the insured without any compensation for this increase, it becomes *ribā*. Also, insurance companies invest their monies in *ribā*-related activities, and they charge interest on late installment payments.
2. *Gharar*: The compensation for insurance is predicated on an uncertain event, which constitutes *gharar*. Insurance companies may thus pay large sums of money with no compensation due to this *gharar*.
3. Fraud (*ghubn*): The insurance contract is fraudulent due to the lack of clarity regarding the object of the contract. Knowing the object of the contract is a condition for its validity.
4. Gambling (*qimār*): There is gambling in insurance since the person and his property are exposed to unknown events, which is the definition of gambling. Also, the insured pays small amounts of money in anticipation of collecting large sums, which is a form of gambling.
5. Ignorance and uncertainty (*al-jahāla*): What the insured person pays is unknown to both parties, as evidenced in the case of life insurance. Both parties thus act according to the contract not knowing what profits or losses may be accrued to them.

Re-insurance and compound insurance

The principle of cooperation in insurance is attained through the division of losses (to a specific person) over the largest possible number of individuals.

⁶² *Al-Mu'amalāt Al-Māliyya Al-Mu'āṣira* by Dr. 'Alī Al-Sālūs (p. 380 onwards).

Thus, as the number of insured individuals increases, the division of losses grows. This subdivision (diversification) may be attained in many ways, including so called re-insurance or compound insurance. This is the contract where an insurance company insures its own liabilities with larger international insurance companies.

Re-insurance has the same legal status as the initial insurance. Thus, a cooperative insurance company may obtain insurance at other cooperative insurance companies. As for commercial re-insurance, it is subject to the same rulings applying to standard commercial insurance, where the only difference is that individuals are replaced with insurance companies.

The restrictions on the types of *gharar* that render a contract defective (that is: (i) that it be a commutative contract, (ii) that the *gharar* is substantial, (iii) that it is fundamental to the contract, and (iv) that it is not dictated by necessity) leads to the prohibition of re-insurance contracts. Exceptions may be allowed if a necessity that cannot be satisfied by other means leads to this type of *gharar*, as ruled by the Juridical Monitoring Agency for the Islamic Faisal Bank in Sudan (*fatwā* numbers 16,17). The determining factor here is whether the insurance companies will face adversity if they do not deal with re-insurance companies.

This Agency (and I agree with this *fatwā*) ruled that re-insurance is valid since it satisfies a need that cannot be satisfied otherwise, as determined by the bank's experts. This ruling is conditional on the following stipulations:

1. That payments to re-insurance companies be kept to the minimum possible amount to satisfy the need, following the rule: "necessities are measured by their degree". The evaluation of the amount needed to satisfy this need is left to the bank's experts to determine.
2. That the cooperative insurance company does not collect a profit commission, or any other commission, from the re-insurance companies.
3. That the cooperative insurance company does not keep any reserves with the re-insurance company for natural (heavenly) disasters, since keeping such reserves would lead to interest payments to the re-insurance companies.
4. That the cooperative insurance company should not be involved in determining the investments of the reinsurance companies. It should not demand any share in the profits they gain from such investments, nor ask about any losses they incur.
5. That the contract with the re-insurance company be for the shortest possible period.
6. That the cooperative insurance company works towards the establishment of a cooperative re-insurance company that would allow it to avoid dealing with commercial re-insurance companies.

This is my religious testimony towards Allāh. I never cease to find strange and reprehensible all the arguments that justify the legality of commercial insurance. I do not find any need to answer their arguments, since they have been answered in a number of journals, books, research papers, and conferences. Such answers were offered beginning the Week of Islamic Jurisprudence in Damascus (1961), and through the decision of the Islamic Jurisprudence Council in its first meeting in Mecca (Sha'ban 1398 H.) at the headquarters of The Islamic League. Those who wish to assure themselves of the prohibition of insurance, and the nullification of the arguments of those who allow it, may refer to the research papers of those two meetings, and may Allāh lead us all to the correct path.

Social insurance: Social insurances paid by governments or retirement and insurance funds to public servants are all valid in my opinion. This follows since the government is responsible to care for her citizens in cases of disability, old age, sickness, and other events that hinder the ability to work and earn an income. One should not thus doubt the validity of the taxes collected by the government from the wages of public servants, those collected by employers on behalf of social insurance agencies, or those voluntarily paid by the workers as a percentage at the end of the year towards a retirement account. All such payments must not be considered *ribā*-related, even if the worker collects more than he paid. This follows since the payments in reality are considered a gift or a voluntary contribution and a general form of cooperation among the participants in such state institutions.

4.2.5 The sale of impure objects

The **Hanafīs** ruled that the sale of wine, pork, dead animals, and blood are not concluded, since such items are not goods eligible to become property. They see no harm in the sale of manure since it is useful in increasing the fertility of land, thus becoming a good. It is permissible to sell mixed items such as oil that is contaminated by impure substances.

They allow the sale of carnivorous animals such as dogs, leopards, lions, tigers, wolves, cats, etc. This follows since dogs and similar animals are goods that are legally useful in protection and hunting. Also, the sale of insects, snakes, and scorpions is allowed if they can be useful.

Also, it is valid to trade in contaminated objects and use them for purposes other than food (e.g. dying, painting, lighting a place other than a mosque). An exception is the fat of a dead animal, which is not valid to use.

The general rule in their school is this: any item that can be used legally to derive a benefit is valid to sell.⁶³ This follows since such items were created for the benefit of mankind, the evidence being the verse: "It is He Who hath created for you all things that are on earth" (c.f. Qur'ān [2:29]).

The **Mālikīs** ruled that the sale of wine, pig, and dead animals is not concluded due to the *Hadīth* narrated on the authority of Jābir: The Messenger

⁶³ Al-Kāsānī ((Hanafi), vol.5, p.142 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, p.188, vol.8, p.122), *Al-Fiqh 'alā Al-Madhbāh Al-'Arba'a* (vol.2, p.231 onwards).

of Allāh (pbuh) said: “Allāh and his Messenger have forbidden the sale of wine, dead animals, pigs, and idols. It was said: ‘O Messenger of Allāh, how about the fats of dead animals, which are used for painting ships, polishing leathers, and lamp oil?’ He said: ‘No, this is forbidden.’” Then, the Messenger of Allāh said: “May Allāh punish the Jews, when Allāh Almighty forbade the fats of dead animals for them, they melted them and sold them, thus consuming their price unlawfully”.⁶⁴ He also said with regards to wine: “The One who forbade its drinking forbade its sale”.⁶⁵

The sale of a dog is not concluded in their school despite its purity, whether it is a hunting or guard dog, since its sale has been forbidden. They cite the *Hadīth*: “The Prophet (pbuh) forbade the price of a dog, the dowry of a prostitute, and the gratuity paid to a soothsayer”.⁶⁶ However, Sahnūn said: “I sell it and perform pilgrimage with its price”.

The sale of items that are tainted with impure objects is not concluded if the contaminated item cannot be purified. Examples are oil, honey and ghee in which impure objects fell. However, a tainted object that may be purified, e.g. a dress, is valid to sell.

Also not concluded is the sale of items that are intrinsically impure, e.g. the manure of animals whose flesh is not permissible to eat, and the feces, bones, and skin of a dead animal. However, the manure of cows, sheep, camels, and similar animals, is permissible since it has uses in fertilizing land.⁶⁷

The Shāfi‘īs and Hanbalīs ruled that it is not valid to sell pigs, dead animals, blood, wine, and similar impure objects. Their proof is the *Hadīth* of the Messenger of Allāh (pbuh): “Allāh and His Messenger have⁶⁸ forbidden the sale of wine, dead animals, pigs, and idols”. Another proof is the need to avoid impure objects and not get near them, and sale is a means of getting near them.⁶⁹

It is not valid to sell a dog even if it is trained due to the above mentioned *Hadīth*: “The Prophet (pbuh) forbade the price of a dog ...”.

It is not valid to sell items that do not have a valid use, such as insects, carnivorous animals that cannot be used in hunting such as lions and wolves, and birds that cannot be eaten and cannot help in hunting (e.g. vultures and

⁶⁴Narrated by the authors of the six books, as well as ’Ahmad, and Mālik in *Al-Muwaṭṭa’* on the authority of Jābir ibn ’abd Allāh, c.f. ’Ibn Al-’Athīr Al-Jazarī (, vol.1, p.375), Al-Šančānī (2nd printing, vol.3, p.5).

⁶⁵Narrated by Muslim and Mālik in *Al-Muwaṭṭa’*, and Al-Nasā’ī on the authority of ’Abd Al-Rahmān ibn Wa’la may Allāh bless his soul that ’Ibn ’Abbās narrated this *Hadīth* to him, c.f. ’Ibn Al-’Athīr Al-Jazarī (, vol.1, p.377).

⁶⁶Narrated by the Authors of the Six Books, and ’Ahmad on the authority of ’Abu-Mas’ūd Al-Anṣārī – ’Uqba ibn ’Amr, c.f. Al-Shawkānī (, vol.5, p.143), Al-Ḥāfiẓ Al-Zaylānī (1st edition, (*Hadīth*), vol.4, p.52).

⁶⁷See *Hāshiyat Al-Dusūqī* (vol.3, p.10 onwards), *Al-Hattāb ḥalā Matni Khalil* (vol.4, p.258 onwards), ’Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.125), ’Ibn Juzayy ((Mālikī), p.246).

⁶⁸Al-Bukhārī and Muslim narrated it thus with a singular object, other narrations state “Allāh has forbidden”, and others state “Allāh and His Messenger have forbidden”.

⁶⁹There is a method in the Shāfi‘ī school for exchanging impure objects that can be used. This method is the abandonment (literally: lifting of hands *rāf’ al-yadd*), thus the seller says: “I have lifted my hand off this object for so much”.

crows). All of those items do not have a use and thus do not have a value. Consequently, taking a financial compensation for such items would be consuming wealth illegally, and paying such a compensation would be stupidity.

It is not valid to sell tainted objects that cannot be purified, such as vinegar and fats. However, it is valid to sell tainted objects that can be purified such as dresses.

It is not valid to sell refuse and similar impure objects.⁷⁰ However, the Ḥanbalīs allowed the sales of pure refuse such as droppings of pigeons and animals whose meat is permissible to eat.

In summary: The Ḥanafī and Ẓāhirī jurists render valid the sale of all impure objects that have a use, except the ones where an explicit prohibition exists. Their proof is the general rule that the permissibility of sale is a function of possibility of using the objects. As for the Mālikī and Shāfi‘ī jurists, and the most common opinion in the Ḥanbalī school, they do not allow the sale of impure objects. Their ruling is based on the general rule that the validity of sale is a function of purity.

4.2.6 Downpayment sale

The Arabic word for downpayment may be read in six different ways: the best linguistically are *al-^carabūn* and *al-^curbūn*. It is also read as *al-^curubān* and *al-^curbān*. It is an Arabized term that lexically means advance payment.

The downpayment sale (*bay^c al-^curbūn*) is where a person buys an item, then pays a portion of the price to the seller, with the understanding that if the sale is executed, the downpayment applies to the price, and if it is not executed it is considered a gift from the buyer to the seller.⁷¹ In this sale, the buyer has an option: if he executes the sale, it becomes a part of the price, and if he does not he loses the downpayment. The period of this option is unspecified. This sale is binding on the seller.

Some of the Ḥanbalīs have ruled⁷² that the waiting period must be predetermined, otherwise, how do we decide how long the seller must wait?

Jurists differed in opinion regarding this type of sale. The majority have ruled that it is a forbidden sale, defective for the Ḥanafīs, invalid for the rest. Their proof is based on the Prophet (pbuh) forbidding the downpayment sale (*bay^c al-^curbān*).⁷³ It is also forbidden due to *gharar*, risk-taking, and taking of money without proper compensation. It also contains two defective conditions:

⁷⁰Abū-’Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.261), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.11), Ibn Qudāmah (, vol.4, pp.251,255 onwards), Marṣī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.6 onwards), ’Uṣūl Al-Buyūc Al-Mamnūcā (p.41).

⁷¹Note that this sale, even though the Ḥanafīs consider it a defective sale (since the corruption is relative to the price), is mentioned here among the invalid sales. This is done since it is most likely that the sale will remain defective, and thus becomes invalid. Also, this classification follows from this sale's containing *gharar*.

⁷²Marṣī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.26).

⁷³This is a *Hadīth munqatī* (disconnected narration *Hadīth*) narrated by ’Ahmad, Al-Nasā’ī, ’Abu-Dāwūd, and its origin is in Mālik’s *Al-Muwatṭa’*. Its narration includes an unnamed narrator who is named in one of the narrations. Thus, the *Hadīth* is deemed a weak one. It contains a number of issues that can be debated. It is narrated on the authority of

one is the condition of gift, and the second is the condition that the buyer may return the merchandise to the seller if he wishes to do so. Thus, the buyer imposed the option without compensating the seller for it, rendering it invalid in analogy to the case where a third party would have stipulated the option. The analogy can be made to a similar condition that states: “I have the option to return the good whenever I wish, with an additional coin”, which would make the sale invalid.⁷⁴

'Ahmad ibn Ḥanbal ruled that there is no harm in this sale, and the proof is the *Hadīth* narrated by 'Abd Al-Razzāq in his *Muṣannaf* on the authority of Zayd ibn 'Aslam that “The Messenger of Allāh was asked about the downpayment (*al-urbān*), and he permitted it”.⁷⁵ Another proof is the narration in the same reference on the authority of Nāfi' ibn 'abd Al-Hārith: “That he bought for 'Umar the jailhouse building from Ṣafwān ibn 'Umayya for four thousand *Dirhams*, on the condition that if 'Umar approves it, then the sale is executed, otherwise, Ṣafwān may keep four hundred *Dirhams*. ”'Aḥmad deemed the narrated *Hadīth* on downpayment sales weak. However, downpayment sales have become common and essential in today’s commercial dealings that contain a clause guaranteeing compensation for other parties’ losses due to waiting and delays.⁷⁶

It is my judgment that it is valid and permissible to use the downpayment sale following convention, since the *Hadīths* used to argue on either side have all been shown to be weak. This is the decision of the Islamic Jurisprudence Council (Majma' Al-Fiqh Al-'Islāmī) in its eighth session in Brunei on the first of Muḥarram, 1414 A.H.

4.2.7 The sale of water

We have seen above the condition that the object of sale must be private property, i.e. be owned by a particular person. Thus, the sale of objects that are not privately owned, such as water, air, and dirt, may not be concluded. We discuss here what we mean by “water”, and the jurists’ opinions on its ownership and sale.

The Ḥanafīs ruled that there are four types of water:⁷⁷

⁷⁴Amr ibn Shu'ayb on the authority of his father on the authority of his grandfather. 'Imām Mālik explained the downpayment sale saying: “that is the case where a man buys a slave, male or female, then he declares to the seller: I gave you a coin on the condition that if I take the object of sale, the coin is part of the price, otherwise, it is yours”, c.f. Al-Ṣan'ānī (2nd printing, vol.3, p.17), Al-Shawkānī (, vol.5, p.153), *Al-Muwatta'* (vol.2, p.151).

⁷⁵Ibn Rūshd Al-Ḥafid ((Mālikī), vol.2, p.161), Al-Dardīr ((Mālikī)A, vol.3, p.63), 'Ibn Juzayy ((Mālikī), p.258), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī)), vol.2, p.39), Al-Shawkānī (, vol.5, p.153), Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.4, p.157), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.9, p.368).

⁷⁶This is a *Hadīth mursal* and its chain of narration involves 'Ibrāhīm ibn 'abī Yaḥyā, and it is thus weak (*Hadīth da'īf*), Al-Shawkānī (, vol.5, p.135).

⁷⁷Ibn Qudāmah (, vol.4, p.232), Al-Sanhūrī's *Masādir Al-Haqq* (vol.2, p.96 onwards), Professor Muṣṭafā Al-Zarqā's *Al-Madkhāl Al-Fiqhī* (section 234). Also, the Hanbalīs have deemed leasing with a downpayment valid, c.f. Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.26).

⁷⁸See 'Ibrāhīm Al-Humām ((Hanafī), vol.8, p.144), 'Ibrāhīm 'Abidīn ((Hanafī), vol.5, p.311).

1. **Sea water:** that is public property for all people, who all have usage rights in any manner they wish, in the same manner that they have free rights of usage of the sun, moon, and air. Thus, an individual may use it to meet private needs, or for irrigation of his private land. Those are what is sometimes called drinking rights (*haqq al-shafa*) and irrigation rights (*haqq Al-shirb*), respectively.⁷⁸
2. **Water in great valleys:** such as the Tigris, Euphrates, Nile Baradā, Al-‘Āṣī, Ṣayḥūn, Jayḥūn, and other public rivers. People have unconstrained public drinking rights in those rivers, as well as unconstrained irrigation rights as long as that does not lead to social harm. If unconstrained irrigation would cause social harm, then it is not valid, since it is obligatory to avoid such harm. It is also valid to install water mills on those rivers as long as that does not lead to any social harm.
3. **Water owned by a specific group:** such as the inhabitants of a specific village, who may own a small river or water springs and wells. This includes water taken from public rivers that are then divided among the inhabitants by digging ditches, etc. For this type of water, all people have drinking rights only, since it is validated by necessity and the difficulty of carrying water everywhere.
4. **Water in containers:** that are owned by the person in possession of those containers. Only the owner of this water has the right to use it, and others may not benefit from it without the owner's permission.

It is therefore clear that water may be classified from the point of view of possession and sale as either public or private. Everyone has a right to the public water due to the Prophet's (pbuh) saying: "Muslims are partners in three: water, pastures, and fire".⁷⁹ Public water subsumes the first two categories outlined above, and covers water not privately owned by anyone. Privately owned water include that owned by individuals or groups, and subsume the second two categories.

The Mālikīs, Shāfi‘īs and Hanbalīs agree with this categorization of water into private and public.⁸⁰ Private water are owned by virtue of being in owned lands, such as wells and springs. Public water are not owned, and are not confined to owned land, such as rivers and some springs.

⁷⁸The first, literally meaning “the right of the lips” refers to the right to use for drinking, providing drinking water to his livestock, and washing. The second refers to a right of using the water according to a specific time-table for watering his plants and allowing animals to drink.

⁷⁹Narrated by ‘Abu-Dāwūd in his *Sunan*, ‘Ahmad in his *Musnad*, and ‘Ibn ‘Abī Shayba in his *Musannaf* on the authority of one of the Prophet's (pbuh) companions. Also narrated by ‘Ibn Mājah on the authority of ‘Ibn ‘Abbās, and Al-Ṭabarānī on the authority of ‘Ibn ‘Umar, see Al-Hāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.294).

⁸⁰Ibn Juzayy ((Mālikī), p.339), ‘Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.427), ‘Ibn Qudāmah (, vol.4, p.78 onwards).

The status of water sales

Jurists agreed that it is recommended to give water without seeking a price even if it is privately owned. However, the owner of water is not to be forced to give it freely except in cases of necessity. Thus, if a group of people are extremely thirsty and fear death, then if the owner of water does not give it freely, they may fight him over it.

However, the Hanafis qualified the cases where fighting over water is permissible thus: Those in need may use weapons to fight the owner of water in a well or river in his private land since he is harming them by denying their drinking right. Water in such wells is public and not private [with regards to drinking rights.] However, if the water was possessed in containers, then the person in need may fight but without weapons, and compensation for the water he takes becomes a liability on him, following the general rule used for taking food in case of a famine. Thus, taking water or food to satisfy a dire need does not void the liability to compensate the owner. However, if the water is not an excess for the owner, i.e. if it is not enough to satisfy the thirst of both parties, then it is an obligation to leave it to its owner.⁸¹

As for the sale of water, there are two general opinions: that of the majority of jurists, and that of the Zāhirīs:

1. **The majority of the jurists ruled**⁸² that it is valid to sell privately owned water (e.g. water in a well, spring, containers, etc.) to people. It is also valid for the owner to benefit from it and to prevent others from using it. Thus, the owner has the right to prohibit a person who possesses drinking rights from entering his property if he has access to other water near him. If he has no such access, the owner of the property must either take the water out to the person who wishes to exercise his drinking rights, or to allow him to enter his property to gain access to the water.

They based this ruling on two proofs:

- (a) A valid *Hadīth* that ^cUthmān ibn ^cAffān (mApbwh) bought the well of Rūma from a Jew in Madīnah, and he made it a *sabil* for the exclusive use of Muslims. He did so after hearing the Prophet (pbuh) say: “Whosoever buys the well of Rūma and makes it available to Muslims will be admitted to paradise”. The Jew who previously owned that well was selling its water. This *Hadīth* illustrates not only the permissibility of purchasing the well itself, and a spring by analogy, but it also illustrates the permissibility of selling water, since the Prophet (pbuh) allowed the Jew to sell it. Arguments contrary to this opinion assert that those events took place in the early stages of Islam, when the Jews were strong, and the Prophet (pbuh) was

⁸¹ Ibn ^cĀbidīn ((Hanafī), vol.5, p.313), 'Ibn Al-Humām ((Hanafī), vol.8, p.145).

⁸² Al-Kāsānī ((Hanafī), vol.5, p.146), 'Ibn ^cĀbidīn ((Hanafī), vol.5, pp. 311-312, vol.4, p.6), 'Ibn Juzayy ((Mālikī), p.339), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), ibid.), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.9, p.278), 'Ibn Qudāmah (, vol.4, p.79), Mar^cibn Yūsuf (1st printing (Hanbali), vol.2, pp.9,277).

originally lenient in accepting their practices. Later, the argument goes, the rules and laws of Islam were established, thus prohibiting the sale of water. This counter-argument also points out that the water was sold in this case as part of selling the well, which is not denied.⁸³

- (b) An analogy can be made between selling public water and selling forest woods after possession. The Prophet (pbuh) permitted the sale of the latter when he (pbuh) said: “It is better for one of you to take his rope, go to the mountain to collect wood, sells it, and uses the proceeds to eat and pay charity, than to ask people for charity”.⁸⁴ This opinion was debated on the basis that making the text specific through analogy is debatable among the scholars of juristic methods, or Islamic legal theory (*'uṣūl al-fiqh'*). Also, this argument may be weakened by noticing that the analogy only justifies the sale of water in possession, to the exclusion of water in wells, etc.

2. **The Zāhirīs ruled**⁸⁵ that it is never permissible to sell water, be it in an irrigation ditch, river, spring, well, or any container. The only exception is the sale of an entire well or a specific part of it, in which case the sale is valid, and the water is included along with the original object of sale.

It is narrated that 'Ahmad said: “I do not like the idea of the sale of water at all”.

The argument they use for prohibiting the sale of water is based on the following:

- (a) The Prophet (pbuh) said: “Excess water may not be sold in a manner that indirectly sells the grass of pastures”.⁸⁶ Thus, it is argued that the sale of water above one’s needs is prohibited. This argument was questioned on the grounds that the prohibition was mentioned in a special case, where the reason for selling the water was to protect the surrounding grass that the shepherds need for their livestock.
- (b) A valid narration states that the Prophet (pbuh) “prohibited the sale of excess water”.⁸⁷ This *Hadīth* is explicit about the prohibition of selling water that are in excess of the needs of the owner. This applies to water in public and privately owned lands, whether it is sold for drinking or other uses. This argument was challenged with the previously reported *Hadīth* of the well of Rūma, due to its restriction to the specific circumstance discussed above.

⁸³ Al-Shawkānī (, vol.5, p.146).

⁸⁴ Narrated by Al-Bukhārī, Muslim, 'Ahmad, 'Ibn Mājah, and Al-Nasā'ī on the authority of 'Abu Hurayra, c.f. Al-Shawkānī (, vol.4, p.163), Al-Suyūṭī (a, vol.2, p.122).

⁸⁵ Ibn Hazm (, vol.9, p.8).

⁸⁶ Narrated by Muslim on the authority of 'Abu Hurayra, and narrated by Al-Bukhārī and 'Ahmad (with slightly different wording), c.f. Al-Shawkānī (, vol.5, p.145).

⁸⁷ Narrated by 'Ahmad and 'Ashāb Al-Sunan, with the exception of 'Ibn Mājah on the authority of 'Iyās ibn 'Abd, c.f. Al-Shawkānī (, vol.5, p.145).

In my opinion, I find that the prohibition of selling excess water refers to large quantities of water such as those in wells and springs, or rain water that collect in a private land, in which cases the sale would be meaningless.⁸⁸

4.3 Types of defective sales

As discussed above, a defective sale in the language of Ḥanafī scholars is one that is valid in its origin but not in description. Such sales result in possession following the receipt of the object of sale. For the non-Ḥanafīs, a sale is either valid or invalid, and invalid sales do not result in possession.

In what follows, I shall enumerate some examples of defective sales in the Ḥanafī school, and discuss their status under other schools.

4.3.1 Sale of unknowns

The Ḥanafīs ruled that if the object of sale or price was subject to major ignorance (*jahāla fāhisha*) in a manner that may result in dispute, then the sale is defective. This follows since such ignorance (*jahāla*) would make it impossible to deliver and receive the price and object of sale, which is the purpose of sales.

If the ignorance regarding the object or price was minor, and would not lead to dispute, then the sale is not defective. Such minor ignorance would not make it impossible to deliver and receive the price and object of sale, thus the purpose of the sale is satisfied.

The type of ignorance (major or minor) is determined by convention. For instance, if the type of animal being sold, or the brand of a radio or camera, is not identified, that would constitute major ignorance that renders the sale invalid. Such ignorance would, no doubt, lead to a dispute among the parties of the contract.⁸⁹

An example of minor ignorance is the sale of one measure from a specific heap of food in exchange for a specified number of coins. A similar example is the sale of a pile of clothes (of unknown number) or a heap of food for a specified price. The sale is valid in this case since it does not contain *gharar*, and the ignorance is minor and does not lead to dispute in most cases.⁹⁰ Another example is the sale of one of two or three items where the buyer retains the option of choosing the one he wishes. This is known as the choice or identification (or selection) option (*khiyār al-ta‘yīn*). In this case, the most common opinion would be to validate the sale, whereas ruling by analogy would deem it defective. The latter is the opinion of Zufar, as detailed below.

The analogy that is used against the permissibility of the identification option is based on the object of sale being unknown, since the seller sells one

⁸⁸See 'Uṣūl Al-Buyūc Al-Mamnūc a (p.46 onwards).

⁸⁹Al-'Amwāl wa Naẓariyyat Al-^cAqd (p.312).

⁹⁰Al-Kāsānī ((Ḥanafī), vol.5, p.157 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.263).

(unidentified) object out of the set. Thus, the object of sale – being unknown – is not valid. This is how Zufar argues against the permissibility of the identification option.

The arguments in favor of permitting the identification option are:

1. An analogy based on the permissibility of conditional options (*khiyār al-shart*). The common feature in the two options is the need to avoid being a victim of fraud (*ghubn*). It is generally possible to classify objects of sale into high, medium, and low quality. Thus, “knowledge” of the object of sale may be reduced to verifying the quality of the object of sale being high, medium or low. Thus, if one item out of four is being sold with an identification option, the sale would be defective (*fāsid*) since it is not necessary to allow such an option.⁹¹
2. There is a need commonly being met by the inclusion of this option. Since some individuals (e.g. the elderly, and some women) cannot go to market to buy what they need, they often send someone to purchase some items on their behalf. Since the messenger may not be able to choose an item that will please the buyer, it is easier to buy one out of two items, takes them to the one who commissioned him to purchase the item, and then one of the objects will be bought at the specified price, while the second is returned. Thus, such a purchase is permissible based on common usage, as long as the number of items does not exceed three, in which case the ruling by analogy is valid.⁹²

We note that the better Hanafi opinion in this case is not to specify a fixed period for the option, in contrast to the case of conditional option (which is three days or less for 'Abu-Hanīfa, and three days or more as long as the period is known for Muḥammad and 'Abu-Yūsuf). Thus, the sale is valid without mentioning the period of the option.

However, some Ḥanafis ruled that the sale is not permissible unless the period of the option is mentioned. Their argument is that for an individual object being sold with a conditional option, the statement of the period of the option is a condition of validity of the sale. By analogy, they argue that the same condition applies to the sale of a single but unidentified object. The common argument in both cases is that not stating, and hence not knowing, the period of the option renders the sale defective.

The earlier argument distinguishes between the conditional option and the identification option thus: A conditional option makes the status of the sale unsettled, since ownership is not transferred while the option is still in force. Thus, the statement of the period of this option is necessarily restricted to the minimum needed period for the buyer to properly inspect the object of sale and avoid being a victim of fraud. In contrast, the identification option does not leave the status of the sale unsettled, since one of the two items (although it is not identified) is in fact sold. Thus, the option only leaves the identification

⁹¹[tr: The issue of selling one out of four objects is discussed in more detail below.]

⁹²Al-Kāsānī ((Hanafi), vol.5, p.157), 'Ibn Al-Humām ((Hanafi), vol.5, pp.130,197).

of which item was sold unsettled, which does not require the specification of a time period.

An example of excessive ignorance is the sale of one out of four items, or one sheep out of a herd, with an option for the buyer to take one and leave the rest. Another example – at the other extreme – is the purchase of one out of two or three items without including an identification option. Thus, it is not valid to sell one out of two or three dresses, where the sale would be defective due to ignorance of the object of sale. This type of ignorance may lead to dispute, since the seller wants to deliver the lowest quality item, while the buyer wishes to take the best item, and both may argue their cases based on the absence of an identification option.⁹³

Generally speaking, excessive ignorance (*al-jahāla al-fāhisha*) may be classified into four categories that were mentioned above:⁹⁴

1. **Ignorance of the object of sale:** We have included examples of this type of ignorance of the genus, type, or measure of the object of sale, on the buyer's part.
2. **Ignorance of the price:** For example, if a person sells a horse in exchange for one hundred sheep from a specific herd, the contract is defective due to ignorance of the price.

Similarly, selling an item (say a dress) “for its value” is defective, since this statement equates “price” to “value”. Since the latter varies depending on the person evaluating the item, this renders the price unknown.

Another example is a person who buys an item at a price based on the assessment of the seller, the buyer, or a third party. In this case, the sale is defective since that assessment is not known at the time of sale, and thus the price is unknown.

If a person says: “I sold you this item in exchange for one measure of wheat or two measures of barley”, the sale is defective, since the price is unknown. One opinion is that such an example qualifies as “two sales in one”, which was prohibited by the Messenger of Allāh (pbuh).⁹⁵ If the seller says: “you can buy it with an immediate price of five, or a deferred price of seven”, then the sale is defective, since it is not determined whether the price will be the immediate one or the deferred one. However, if the buyer removes the ambiguity by choosing one of the two formats, the sale is valid.

Similarly, a sale at the (unknown) cost of the object, or its code (*raqm*)⁹⁶ (while the buyer does not know what the code means or what the cost was),

⁹³ibid., 'Ibn Ḥāfiẓ ((Hanafī)), vol4, p.115).

⁹⁴*c Aqd Al-Bay*^c by Professor Al-Zarqā'.

⁹⁵Narrated in *Al-Muwaṭṭa'*, Al-Tirmidhī, Al-Nasā'ī, and 'Abu-Dāwūd on the authority of 'Abū Hurayra that the Prophet (pbuh) forbade two sales in one sale, c.f. 'Ibn Al-'Athīr Al-Jazārī (, vol.1, p.446).

⁹⁶A code may be a number written on the object so that an agent would know the price, but not the buyer (*Al-īnāya*, vol. 5, p.113), and this includes ignorance of the object of sale and its characteristics. A form of this sale is where the buyer pays a price and gets a number

is defective. However, if the buyer learns of the object's cost, or deciphers its code during the contract session, then the sale is permissible since the ignorance has been removed during the contract session. However, if this knowledge is not given to the buyer until after the contract session ended by parting, then the defectiveness of the sale is not removed.⁹⁷

Zufar ruled that if the contract was deemed defective at its initiation, it cannot be permitted, since – in his opinion – the defective is impossible to make permitted.⁹⁸

The schools of jurisprudence agree on the prohibition of sale by code based on ignorance of the price. However, if the price is known, then they agree that it is permitted. For example, the seller may say: "I sold you this dress based on its code, which is the price written on it". Then, if that price is known at the time of the contract, this sale has a known price, and it is valid.⁹⁹

It is not valid in the opinion of jurists to sell at "the market determined price" or "at the price at which people sell", or "at the price that so-and-so chooses", since the price is thus unknown. It is narrated that 'Imām 'Aḥmad ruled for the validity of sale at the price to be determined by the market at a specified future time¹⁰⁰ without specifying that price at the time of the contract, due to its common use in most societies. 'Ibn Taymiya and 'Ibn Al-Qayyim have also favored permitting this type of sale. To avoid confusion, what is referenced in this case is a "market determined price at the time of conclusion of the sale", not any future price.¹⁰¹

3. Ignorance regarding the time period: This applies to sales with a deferred price without specifying the time period, as well as sales including a conditional option without specifying the period of the option. Such sales are defective, based on the *Hadīth* that the Prophet (pbuh) "prohibited the sale of the unborn fetus in its mother's womb", as explained by the

that corresponds to one of many different objects. Whichever object matches that number is deemed to be what he bought in exchange for the price he paid. This eliminates the factor of choice and free will on the part of the buyer, and resembles the pebble sales that were common before Islam (see *'Uṣūl Al-Buyū'c Al-Mamnū'a* by Professor ḨAbd Al-Samī', pp. 72,75). In summary, the code is a written symbol, and the meaning of selling an item based on its code is selling it for the price that is coded on it, but that is unknown to the buyer at the time of the contract. The four schools of jurisprudence and Zāhirīs agreed on this type of sale not being permissible.

⁹⁷ Al-Kāsānī ((Hanafī), vol.5, p.158), 'Ibn Al-Humām ((Hanafī), vol.4, p.30), 'Ibn ḨAbidīn ((Hanafī), vol.5, p.113), Al-Sarakhsī (1st edition (Hanafī), vol.13, p.49).

⁹⁸ Al-Kāsānī ((Hanafī), vol.6, p.124).

⁹⁹ Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.17), 'Ibn Qudāmah (, vol.4, p.187).

¹⁰⁰[tr.: the first of these is what is called a "market order" in today's financial markets.]

¹⁰¹See Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.17), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.266), 'Ibn Juzayy ((Mālikī), p.257), Al-Dardīr ((Mālikī)A, vol.3, p.15), Marī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.14), 'Ibn Qayyim Al-Jawziyyah ((Hanbalī), vol.4, p.5 onwards), 'Ibn Ḥazm (, vol.9, p.19), *Naṣariyyat Al-Darūrat Al-Shar'iyya* by Dr. Al-Zuḥaylī (p.178 onwards).

narrator 'Ibn 'Umar. He explained this *Hadīth* to refer to sales with a deferred price until the she-camel delivers what is in her womb, and then the born she-camel gives birth to another. Thus, the prohibition is related to deferment for an unknown time period.

Similarly, if one sells with deferment till the return of pilgrims, crop harvesting and threshing time, collection of (ripe) grapes, or sheep shearing time, then the sale is defective; since ignorance of the timing of such events and the ensuing delay may lead to disputes. However, if a sale is conducted with deferment to such times, and then the two parties to the sale agree to drop the deferment prior to the occurrence of such events, then the sale is valid. This follows since defectiveness was caused by the possibility of disputes. Since the potential for dispute is removed, and since ignorance is not an integral part of the contract, but rather an ancillary component (the deferment), the defectiveness is removed.¹⁰²

4. **Ignorance regarding the means of recording the contract:** For example, if the buyer requires a guarantor or a pawned-object to guarantee the deferred price, then such items must be specified, otherwise the sale would be defective.

The preceding was the detailed ruling on sales of the unknown in the Ḥanafī school. The Mālikīs, Shāfi'īs, Ḥanbalīs, and Zāhirīs ruled that it is not permissible to sell an unknown object of material value (*'ayn majhūla*) such as one car out of many, or one dress out of two or many. They also ruled that it is not permissible to sell forward with an unknown price, or a price deferred to an unknown time period, etc. In all such cases, they deemed the sale to be invalid based on *gharar* caused by ignorance relating to the object of sale, and the Messenger of Allāh (pbuh) forbade *gharar* sales. Thus, they included among the conditions of validity of sale that the object of sale be known to the parties of the contract. The object of sale does not have to be known in all respects, but it has to be identified if the object is non-fungible (*'ayn*) and it should be identified in measure and characteristic for fungibles (*dayn* or *mā fi al-dūimma*). They also ruled that the price must be known in its characteristics, measure, and time of delivery. Thus, it is not valid to suspend the sale conditional on a future event such as the beginning of a month, or the return of the pilgrims, since that would be a *gharar* sale.¹⁰³ However, the Mālikīs have allowed sales with deferment to crop harvesting and threshing, or the time of departure of the pilgrims, or to the time of other specific events with a known time. They also allowed sales with identification options, which they called "choice sales" (*bay' al-'ikhtiyār*). However, they required that the objects of sale be of the same genus and type, and that the price be of the same genus and type, where

¹⁰² Ibn Al-Humām ((Hanafī), vol.5, p.322 onwards), Al-Sarakhsī (1st edition (Hanafī), vol.13, p.26), 'Ibn 'Abidīn ((Hanafī), vol.4, p.125). Note that sales with such deferment is defective, however, deferring the price alone to such a time is valid.

¹⁰³ *Hāshiyat Al-Dusūqī* (vol.3, p.15), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, pp.263-266), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.16), 'Ibn Qudāmah (, vol.4, pp.209,234), Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.11), 'Ibn Hazm (, vol.8, p.497 onwards).

any differences would invalidate the sale. There is no ignorance (*jahāla*) without excessive risk (*gharar*).¹⁰⁴

Gharar and ignorance (jahāla)

Gharar is more general than *jahāla*. Thus, everything containing ignorance (*jahāla*) is also *gharar*. However, not all *gharar* is due to ignorance. For example, *gharar* may exist without *jahāla* or ignorance as in the case of buying a runaway-slave with known characteristics.¹⁰⁵

4.3.2 Suspended conditional sales and future sales

Suspended conditional sales (*al-bay^c al-mu^callaq*), or suspended contracts in general are contracts whose existence is predicated on a possible event using one of the verbal instruments of suspension such as: if, when, etc. For example, a person may say to another: “I have sold you this house of mine for so-much if so-and-so sells me his house, or if my father returns from his travels”.

Future sales (*al-bay^f al-mudāf*),¹⁰⁶ or future contracts in general are ones where the offer specifies actions to take place in a future time period. For example, a person may say to another: “I have sold you this car for so-much at the beginning of the next month”.

For the Ḥanafīs, the difference between the two is thus: The suspended contract is considered non-existent, and is therefore not concluded at the time. It is thus suspended pending satisfaction of a condition, and the condition may and may not be satisfied. On the other hand, the future contract is a concluded contract, with the status and consequences of a concluded sale. The only difference is that the consequences of such a contract take place at the time designated by the two parties to the contract.

Jurists agreed that suspended and future sales are not valid. For the Ḥanafīs, such sales are defective (*fāsid*), and for other schools of jurisprudence, it is invalid (*bātil*).

Therefore, it is not valid to suspend a sale or make it a future contract, since a sale is a contract that results in instantaneous change of ownership. Such contracts thus may not be deferred to the future, and may not be suspended pending a condition since this involves gambling, i.e. suspension based on a probabilistic risk.

¹⁰⁴ Al-Dusūqī on *Al-Sharḥ Al-Kabīr* (vol.3, p.106), 'Ibn Juzayy ((Mālikī), p.269), *Al-Muntaqā^c alā Al-Muwatṭa'* (vol.4, p.298). The Zāhirīs have permitted deferring the price until the time the buyer has the means to pay (*Al-Maysara*, 'Ibn Hazm (, vol.8, p.477 onwards).

¹⁰⁵ *Al-Gharar wa 'Atharuhu fī Al-^cUqūd* (p.39), Al-Qarāfi ((Mālikī), vol.3, pp.265,270 onwards).

¹⁰⁶ Tr: Since “forward” sale is used as a translation of the valid *bay^c al-salam*, we use “future sale” here for *al-bay^f al-mudāf*. In modern financial markets, both “forwards” and “futures” refer to forms of *al-bay^f al-mudāf*, the difference being the bilateral nature of the former and trading on an exchange of the latter. We alert the reader to the fact that we distinguish in this book between valid “Islamic forward” sales (i.e. salam) and the defective or invalid (depending on the school of jurisprudence) “future” or “modern forwards and futures” sales.

Thus, both of those types of sales are defective due to containing *gharar*. In a suspended sale, the parties do not know whether the condition on which the sale is suspended will take place or not, and they do not know when it will take place if it ever does. In future sales, the two parties of the contract do not know the condition of the object of sale in the future, or how content they will be with the contract and the benefits that they derive from it at the time of the sale.¹⁰⁷

4.3.3 Sales of absent and uninspected non-fungibles

An “absent or uninspected non-fungible” (*al-^cayn al-*ghā’iba** or *al-^cayn ghayr al-mar’iyya*) is a non-fungible item that is owned by the seller and existent, but unseen.

The Ḥanafis ruled that it is valid to sell an absent or un-inspected non-fungible without inspection or description. The buyer then has the option to execute the sale or nullify it once he sees the object. Similarly, an object sold based on a description must contain the “inspection option” (*khiyār al-ru’ya*), even if the object does agree with the description given by the seller. Examples of the latter type of sale include buying a covered horse, furniture in a box, or a quantity of wheat in a house. The proof of the Ḥanafis for the validity of the sale in both cases is based on the buyer’s inspection option, which removes all *gharar*. Thus, ignorance in this type of sale may never lead to a dispute as long as the buyer has the option.¹⁰⁸ They have also found proof for this position in the *Hadīth*: “Whoever buys an item that he has not seen, he has the option once he sees it”.¹⁰⁹

The Mālikis ruled that it is valid to sell an absent non-fungible based on a description if its absence does not raise a doubt that its characteristics may change prior to receipt. Then, if the object is delivered meeting the specified description, the sale is binding, since this is a minor *gharar*, and a description plays the role of inspection in the case of absent merchandise. Moreover, using description in place of inspection may have benefits such as avoiding costs of showing it, including possible damage that may be caused by repeated transportation and/or display. However, if the object is not in accordance with the description in the contract, then the buyer has the option.

The Mālikīs also ruled in their most commonly-held opinion that it is valid to

¹⁰⁷Ibn ‘Ābidīn ((Hanafi), vol.4, p.244), Al-Qarāfī ((Mālikī), vol.1, p.229), Al-Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.9, p.374), ‘Abū-‘Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.266), ‘Ibn Qudāmah (, vol.5, p.599), *Al-Amwāl wa Nazariyya T Al-^cAqd* by the late Muhammad Yūsuf Müsā (p.451 onwards), *Al-Gharar wa ’Atharuhu fī Al-^cUqūd* by Siddīq Al-’Amīn (pp.137-149).

¹⁰⁸Al-Kāsānī ((Hanafi), vol.5, p.163), ‘Ibn Al-Humām ((Hanafi), vol.5, p.137).

¹⁰⁹This *Hadīth* has been narrated both with an *’isnād* (i.e. someone saying that he heard the Prophet (pbuh) saying such-and-such), and *mursal* (i.e. someone saying that the Prophet (pbuh) allowed, forbade, or decided such-and-such) The *musnad* version was narrated in the *Sunan* of Al-Dāraqutnī on the authority of ‘Abu Hurayra, and the *mursal* version was narrated by ‘Ibn Shāybā and Al-Dāraqutnī on the authority of Makhlūf, and Al-Nawawī narrated an agreement that it is a weak tradition. c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (*Hadīth*), vol.4, p.9), Al-Sakhāwī (, p.403).

sell an absent object without a specific description of its genus, type, or state.¹¹⁰ The Mālikīs call this type of sale “program (or envelope) sales” (*al-bayf ‘alā al-barnāmaj*), where the “program” refers to a list describing the contents of a container of objects of sale (e.g. clothes), which were not inspected by the buyer in terms of their genus and kind.¹¹¹ Permission of this type of sale is based on necessity due to the difficulty and effort that the seller would have to exert to open containers, thus the description may satisfy the need for visual inspection.

The most common opinion among the Shāfi‘īs, and according to one of the ’Ibādī opinions, is that it is never valid to sell an absent object of sale, where absence is defined by as that which was not seen by one or both of the parties. This is true even if the object of sale is present, since the sale contains *gharar*. The Messenger of Allāh (pbuh) forbade the *gharar* sales, and the sale of an item whose genus and kind are not known contains significant *gharar*. Even in cases where the genus and kind may be known, such as: “I sold you my Arabian horse”, the sale is not valid in the new Shāfi‘ī school since ignorance about the characteristics of the object of sale results in *gharar*. Also, forward (*salam*) sales are not valid if the object of the sale is not properly described.

As for the *Hadīth* of the inspection option: “Whoever buys an item that he did not see, then he has the option once he sees it”, it is a weak *Hadīth* as stated by Al-Bayhaqī. Also, Al-Dāraqutnī says about this *Hadīth* that it is an invalid one, which was not narrated by any others.¹¹²

The Hanbalīs have two opinions, the favored among them is that the sale of an absent object that was not described or seen in the past is not valid. The second opinion, which deems the contract valid, establishes an option for both the buyer and the seller at the time of viewing the object. The first opinion is based on the prohibition of *gharar* by the Prophet (pbuh).

If the object is described to the buyer in a manner sufficient to make a forward (*salam*) sale valid, then the majority of Hanbalīs agree that the sale is

¹¹⁰ Al-Ḥattāb (1st edition (Mālikī), vol.4, p.294 onwards), Al-Dardīr ((Mālikī)A, vol.3, p.25 onwards), Al-Dardīr ((Mālikī)B, vol.3, pp.41-44), ’Ibn Juzayy ((Mālikī), p.257). The Mālikīs have enumerated five conditions regarding the binding nature of sales based on description: (i) that the object of sale is not so far away (e.g. the distance between Spain and Africa) that it is likely that its condition will change prior to receipt; (ii) that it is not very near, e.g. in the same city (however, the most common opinion is that an object present at the sale session may be sold based on description); (iii) for some of them, the description must be made by a person other than the seller (but the more correct opinion is that it is valid based on a description given by the seller); (iv) that the description covers all relevant aspects; and (v) that immediate price collection is not made a condition of the sale, except for objects that are unlikely to change such as real estate. It is valid, however, to collect the price unconditionally – i.e. where the seller does not make it a condition that the buyer must pay the price immediately, but the buyer does volunteer to pay it. This final condition relates to non-fungibles that are possible to change. However, for objects of sale that are unlikely to change in a short time-period, such as real estate, then it is valid to make immediate payment a condition. The reason for this condition is to eliminate *gharar* from the contract based on its possibility of being a forward sale (*salam*) or a regular sale.

¹¹¹ See Al-Bājī Al-’Andalusī (1st edition (Mālikī), vol.2, p.160).

¹¹² Abū-’Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.263), Al-’Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.9, p.315), Al-Khatīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.18), *Sharḥ Al-Nayl* (vol.4, p.143).

valid. 'Ahmad ruled that it is not valid until the buyer sees the object, since the description does not lead to knowledge of the object, thus the sale is not validated by such a description. His argument in this case is that the described but not seen object is deemed an object for which *salam* sales are not valid.

On the other hand, the more common opinion in the school is based on the argument that it is a sale based on description, which makes it valid in the same manner that *salam* sales are validated. Their argument, thus, is that knowledge of the object of sale is indeed attained through description of the apparent characteristics on which the price is based. Such a description is thus sufficient, the proof being that it is sufficient for *salam* sales.¹¹³

In summary, the Ḥanafīs, the Mālikīs, the majority of Ḥanbalīs, the Zāhirīs, the Zaydīs, the 'Imāmīs, and some of the 'Ibādīs all allow the sale of an absent object based on description.¹¹⁴ As for the sale without inspection and without description, it was allowed only by the Ḥanafīs.

Sale of difficult to inspect items

Some objects of sale cannot be seen without the seller encumbering excessive effort or the object being exposed to ruin. Examples include the sale of preserved goods, medicines, and liquids and gases whose containers should only be opened at the time of use. Other examples include underground produce such as carrots, turnips, and potatoes. The Ḥanafīs have allowed the sale of such items in the same manner they allowed the sale of missing objects of sale. Similarly, the Mālikīs allowed such sales since the object of sale is known by custom, and the inherent *gharar* is limited. However, the Shāfi'īs, Ḥanbalīs, and Zāhirīs have deemed such sales invalid, since it is not possible to describe the object of sale, which results in ignorance and *gharar* that were prohibited.¹¹⁵

4.3.4 Trading by a blind person

The discussion on this issue relates to the condition of inspection of the object of sale within the context of the above mentioned disagreement on sales of absent merchandise.

The Ḥanafīs, Mālikīs, and Ḥanbalīs ruled that buying, selling, leasing, pawning, and gift giving, by a blind person are valid. In cases of inspection options, the option refers to forms of inspection that give him information about the object of sale; e.g. touch, smell, taste, etc. He may also rely on descriptions of the object of sale, e.g. descriptions of fruits on the tree and of real estate. Their proof relies on the *Hadīth*: "Sales are but based on mutual agreement".¹¹⁶ In

¹¹³Ibn Qudāmah (, vol.3, pp.580-582), Marṣī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.10).

¹¹⁴Ibn Hazm (, vol.8, p.389), Al-Ḥusayn Al-San`ānī (1st edition, (Shī'ah Zaydiyyah), vol.3, p.259), Al-Hillī ((Shī'ah 'Imāmiyyah), p.145), *Sharḥ Al-Nayl* (vol.4, p.137).

¹¹⁵Ibn 'Abidin ((Hanafī), vol.4, p.106), Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.156), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.9, p.338), Ibn Hazm (, vol.8, p.456), and *al-Buyūr Al-Mamnū'a* by Professor 'Abd Al-Samī' (p.67).

¹¹⁶Narrated by 'Ibn Majah and Al-Bayhaqī, and authenticated by 'Ibn Hibbān on the authority of 'Abu-Sa'id Al-Khudriy. Full references for this *Hadīth* were previously provided.

this case, the blind person has agreed to the sale, and he has multiple means of gaining information regarding the object of sale. In this way, he is similar to a person with sight, and just as sign-language is a valid substitute for voice for a mute person, the senses of smell and taste may substitute for the blind person's eyesight.¹¹⁷

Of course, the Ḥanafīs and Mālikīs, as we have seen, do not necessarily give the seller the inspection (sight) option, whether he is seeing or blind.

The Shāfi'īs have ruled that buying and selling of a blind person is not valid, unless he had seen the object of sale before losing his eyesight, and only if the object of sale does not change, e.g. iron, etc. Their proof is based on the blind person's inability of distinguishing between goods of good and bad quality, and thus he is deemed ignorant of the object of sale.¹¹⁸

4.3.5 Sale with a forbidden price

If the price is forbidden, e.g. wine or pig, then the sale is defective for the Ḥanafīs since there is indeed no sale, where a sale is the exchange of one private property for another. Wine and pigs are considered private property by some infidels, and although the Ḥanafīs consider them property, they are not valued property for Muslims (i.e. *māl*, but not *māl mutaqawwam* from the viewpoint of Islamic jurisprudence). In this case, the general juristic rule is thus: if one of the two compensations (either the object of sale, or the price) is not considered property in a revealed religion (Judaism, Christianity, or Islam), then the sale is invalid whether the non-property is the price or object of sale. Thus, the sale of a dead animal, blood, or a free human being, are all invalid. Similarly, the correct opinion for the Ḥanafīs is that such items are invalid as prices, since a condition for the conclusion of sales is that the price be a property.

If one of the two compensations is considered valued property in some religions but not in others, then: (i) If it may be specified as a price, the sale is deemed defective. Thus the sale of a dress for wine, or wine for a dress are both defective. (ii) On the other hand, if it is specified as the object of sale, then the sale is invalid. Thus, the sale of wine for coins, or coins for wine are both deemed invalid. In this case, if the price is forbidden, the sale must be concluded based on "value" (*qīma*), rather than price (*thaman*).¹¹⁹ It is clear that this type of sale is invalid in the non-Ḥanafī schools.

4.3.6 Time sales (*buyūc al-'ajāl*)

The expression used for this type of sale is *al-bayc nasi'a* (which refers to deferring the price) *wa al-shirā' naqdan* (which refers to purchase with an immediately paid cash price).

¹¹⁷ Al-Ṭahāwī ((Ḥanafī), p.83), Al-Kāsānī ((Ḥanafī), vol.5, pp.164,298), *Hāshiyat Al-Dusūqī* (vol.3, p.24), 'Ibn Qudāmah (, vol.4, p.210), Marīt ibn Yūsuf (1st printing (Hanbali), vol.2, p.10).

¹¹⁸ Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.264).

¹¹⁹ Ibn Al-Humām ((Ḥanafī), vol.5, p.186), Al-Kāsānī ((Ḥanafī), vol., pp.141,305), 'Ibn cĀbidīn ((Ḥanafī), vol.4, pp.105,108).

If a contract is used as an instrument to attain an illegal end, is the contract concluded based on the satisfaction of its cornerstones of offer and acceptance, or is it considered invalid due to its illegal motivation? For example,¹²⁰ if a person sells some property to another with a deferred price, then buys it back with an immediate price, such as selling one ton of cotton for 5000 coins to be paid in a year, then buying it back from the buyer for 4000 coins to be paid immediately, two sales contracts have taken place. Both sales contracts are apparently (or superficially) valid since they satisfy all the cornerstones and conditions of sale. These types of sales are called “same-item sales” (*buyūc al-^cīna*) in the Mālikī school. In reality, it is a type of “time sales” (*buyūc al-’ajāl*). Notice, that the Mālikīs have distinguished between two types of sale: (i) time sales (*buyūc al-’ajāl*), where the buyer sells what he bought to the seller or his agent, with a time difference; and “same-item sale-resales” (*buyūc al-^cīna*), where a person says to another: “buy this good for an immediate price of 10 coins, and I will buy it from you for 12 coins as a deferred price”.

The Shāfi’īs and the Zāhirīs ruled that this contract is valid since it satisfies the cornerstones of offer and acceptance, and matters of intention are left for Allāh alone to judge.

The Mālikīs and Ḥanbalīs ruled that this contract is invalid – in order to protect against abuses of the Law – if there is proof that the intention was defective. The applications of this disagreement appears in the issues of form-marriage (*zawāj al-muhallil*),¹²¹ same-item sale-resales (*bayūc al-^cīna*), and the sale of grapes to a wine-maker.¹²²

’Abu-Ḥanīfa rendered valid form-marriage from a person other than the ex-husband, and selling of grapes to the wine-maker, as long as the contract does not explicitly contain a condition that invalidates it. However, he ruled that same-item sale-resales (*bayūc al-^cīna*) is defective as long as it does not involve a third party.

Same-item sales (*bayūc al-^cīna*)

This is a sale that is intended as a trick to allow borrowing with interest (*ribā*). It is conducted thus: a man sells an item with a deferred price, then buys it back immediately for a lower cash price. It is called ^cīna since the buyer of the objects takes a non-fungible ^cayn (in the form of present immediate monies) instead of the object he bought. The reverse transaction is identical in its effect. An example of this sale is the following: (i) a man sells an object to another for a known price deferred to a known time period; (ii) then, he buys it back with a different known price to a different known time period, or with an immediate and lower price; (iii) at the specified time of the first (i) contract, the full (higher)

¹²⁰ Al-Ḥatṭāb (1st edition (Mālikī), vol.4, pp.390 onwards, 404), Al-Dardīr ((Mālikī)A, vol.3, pp.76,88), Al-Dardīr ((Mālikī)B, vol., pp.116,132).

¹²¹[tr.]: A form-marriage is a legal trick sometimes used following an irrevocable divorce by using a *muhallil* – i.e., a person other than the ex-husband who marries the woman for the sole purpose of divorcing her allow her to re-marry her ex-husband.

¹²² *Al-’Amwāl wa Nazariyyat Al-^cAqd* (p.297 onwards), *’Uṣūl al-Buyūc Al-Mamnūc a* (p.102).

first price is paid, thus the difference between the two prices becomes interest, or *ribā*, for the owner of the object who engages in this false sale. Thus, the entire operation is a trick to borrow with interest (*ribā*) disguised as purchases and sales.

The two parties to this type of contract may use a third intermediary. After the person who wishes to borrow with interest purchases the item from its owner with a deferred price, the intermediary then buys it from him with an immediate price. Then, the intermediary sells the object to its original seller for the same price at which he bought it, and the seller thus collects the *ribā* (interest).

Jurists disagreed over the case where an intermediary is involved, despite the fact that dealing in *ribā* is clearly the intention of the buyer and seller.

'Abū Ḥanīfa ruled that it is a defective contract if there is no intermediary between the buyer and seller. We notice that 'Abū Ḥanīfa thus diverged from his general rule that would deem this contract valid.¹²³ This divergence is based on the *Hadīth* we shall list below in the story of Zayd ibn 'Arqam. It is also based on the fact that before the deferred price is paid by the buyer, the first sale is not concluded. Since the second sale is built on the first, the first seller may not buy any item from one who does not yet own it in this case the first buyer who has not yet paid the deferred price, thus the second sale becomes defective.

'Abū Yūsuf ruled that this type of sale is valid, and is not reprehensible (*makrūh*). Muḥammad, on the other hand, ruled that it is valid but reprehensible, going as far as saying: "The dislike in my heart for this sale is as large as the mountains; it was invented by those who consume *ribā*".¹²⁴

The Shāfi'īs and Dāwūd of the Zāhirī school ruled that this contract is valid but disliked. Their proof is that the contract's cornerstone of valid offer and acceptance is satisfied, and a contract may not in their opinion be invalidated based on unobservable intentions.¹²⁵ Thus, the status of the contract is determined for them by its apparent characteristics, while perverse intentions are left for Allāh to judge.

The Mālikīs and Ḥanbalīs ruled that the contract is invalid in order to avoid permission of illegal transactions.¹²⁶ Their ruling is also based on the story of

¹²³That rule being that what matters in contracts is the language of the contract, and not the intentions of the contractors. This follows since the intention to achieve an illegal end is hidden, and thus must be left to Allāh alone to punish the one who harbors such an intention. This is in contrast to the school of 'Imām 'Ahmad 'Ibn Ḥanbal who is rightfully firm in protecting the correctness of the intention more than the language, c.f. 'Ibn Qayyim Al-Jawzīyah ((Hanbalī), vol.1, p.106 onwards), *Nazariyyat Al-^cAqd* by Professor Sheikh Muḥammad 'Abu Zahra (p.215).

¹²⁴'Ibn Al-Humām ((Ḥanafī), vol.5, p.207 onwards), 'Ibn Ḩābidī ((Ḥanafī), vol.4, pp.255,291), *Al-'Amwāl wa Nazariyyat Al-^cAqd* (p.301).

¹²⁵Al-Sha'^carānī ((Shāfi'ī), vol.2, p.70), *'Irshād Al-Fuhūl* by Al-Shawkānī (p.217), 'Ibn Juzayy ((Mālikī), p.271).

¹²⁶Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.140 onwards), Ḥāshiyat Al-Dusūqī (vol.3, p.91), Al-Ḥaṭṭāb (1st edition (Mālikī), vol.4, p.404), 'Ibn Juzayy ((Mālikī), pp.258,271 onwards), Al-Dardīr ((Mālikī)B, vol.3, p.130), 'Ibn Qudāmah (, vol.4, p.175 onwards), Al-Shawkānī (, vol.5, p.206), *Al-Muwāfaqāt* by Al-Šāṭibī (vol.2, p.361), Al-Qarāfī ((Mālikī), vol.3, p.266 onwards), and *'Uṣūl Al-Fiqh* by Dr. Al-Zuhaylī (vol.2, p.895 onwards). Moreover, the Ḥanbalīs deemed

Zayd ibn 'Arqam with *cĀ'isha* (mAbpwh): Al-*cĀliya* bint 'Ayfa^c said: the wife of Zayd, the mother of his child¹²⁷ and I visited *cĀ'isha* (mAbpwh), then the mother of his child said: "I sold a slave to Zayd ibn 'Arqam in exchange for 800 *dirhams* deferred, then I bought him back for 600 *dirhams* in cash", *cĀ'isha* said: "Woe to what you sold and what you bought, tell Zayd that he has voided his fighting with the Prophet (pbuh) unless he repents".¹²⁸ Also, the Prophet (pbuh) said: "When people are miserly with their *dīnārs* and *dirhams* (gold (Roman) and silver (Persian) coins, comprising the currencies being used at his time), trade in *cīma*, follow the tails of cows, and desert the striving in the cause of Allāh, Allāh will send unto them a suffering that he will never lift until they rediscover their religion".¹²⁹

They have rationalized this ruling by analogy to the set of forbidden consequences that render these contracts defective, since those forbidden consequences are the sole reason for those contracts to exist.

In summary: the majority of non-Shāfi'i jurists ruled that this sale contract is defective since it is an excuse and means for committing *ribā*. It is used in order to permit that which Allāh has forbidden, and therefore it is not valid. In contrast, Al-Shāfi'i said that the first *Hadīth* is not valid, and argued that if it is valid, then it shows that Zayd disagreed with the opinion of *cĀ'isha* (mAbpwh), and whenever the companions of the Prophet (pbuh) disagree among themselves, his school resorts to analogy.

Note that the Shāfi'is and the Zāhirīs relied on the apparent form of the contract, thus ruling that it is valid based on the verse: "And Allāh has permitted trade" [2:257]. This opinion is not accepted since the apparent form is considered if there is no evidence to the contrary. In this case, convention provides significant information that the intention of those who use this contract is to permit that which is prohibited. What is known by convention is one of the strongest considerations, since it is given the same status as an explicit condition in the contract. Thus, this implicit condition known by convention deems the apparent form of the contract a method to legalize prohibited transactions, and thus ruling on the apparent form of the contract also leads to invalidating

the first contract invalid since it can be a vehicle for the second one. They ruled further that if the characteristics of the object of sale changes positively or negatively, and if the initial seller buys the item from a person other than the initial buyer, or if he buys it with the same price or in a different currency, then the sale is valid. It is also deemed valid in their opinion if his father, son, etc. buys it as long as it is not intended as a trick (*hīla*), in which case it would be invalid, c.f. Mar'i ibn Yūsuf (1st printing (Hanbalī), vol.2, p.20).

¹²⁷[tr.] "The mother of his child" ('umm *walad* of so and so) is used to denote a slave woman who was impregnated by her owner and gave birth to his son.

¹²⁸This *Hadīth* is narrated by Al-Dāraqutnī on the authority of Yūnus ibn 'Isḥāq on the authority of his grandmother on the authority of 'Umm Muhibba on *cĀ'isha*. Al-Shāfi'i ruled that it is not a valid *Hadīth*, but 'Imām 'Ahmad narrated it in his *Musnad*, and ruled that its chain of narration is good, even though Al-Shāfi'i does not report it. Also, Al-Dāraqutnī himself said regarding the grandmother: she is unknown, and cannot be used as a trusted narrator, c.f. 'Ibn Al-'Athīr Al-Jazarī (, vol.1, p.478).

¹²⁹Narrated by 'Ahmad, and 'Abu-Dāwūd on the authority of 'Ibn 'Umar, also narrated by Al-Tabarānī and 'Ibn Qatṭān, who deemed it a valid (*sahīh*) *Hadīth*. Al-Dhahabī said: this *Hadīth* is among the denied ones of 'Atā' Al-Khurāsānī, c.f. 'Ibn Al-'Athīr Al-Jazarī (, vol.5, p.206).

the sale.¹³⁰

Tawarruq sales

This is the type of transaction where a person buys a commodity with a deferred price, then sells it to a third party (other than the original seller) for an immediate cash price. The purpose of this contract is to obtain cash immediately, and it is considered a reprehensible (*makrūh*) sale in the opinion of Mālik and one of the two opinions narrated on behalf of 'Ahmad.

4.3.7 The sale of grapes to a wine-maker

'Abu-Ḥanīfa and Al-Shāfi'ī ruled that this sale is valid based on the apparent form of the contract, but it is reprehensible to sell grapes to a wine-maker, or sell weapons to one who uses them to fight Muslims. The validity of the sale relies on the uncertainty whether the grapes can be used to make wine, or that the weapons will indeed be used to fight Muslims, and also since each man should only be accountable for his intended goals. Thus, if it is known that a person will use this valid contract for illicit ends, he may be prevented from using such a contract. Thus what is prohibited in this case is the defective belief of the person who may use this contract for illicit ends, but the contract itself is not invalid. This is similar to the case of a seller who hides a defect in his merchandise.¹³¹ In general, the status of a contract based on its apparent form is one issue, and ruling on the intentions that lead to its use is another.

The Mālikīs and the Ḥanbalīs have ruled that selling grapes to one who uses them to make wine is invalid, and similarly invalid is the sale of weapons to those at war or potentially at war with Muslims, or to highway robbers. All those sales are invalid to prevent the means towards achieving prohibited ends. The general rule, thus, is that the means towards achieving prohibited ends (*ḥarām*) are themselves prohibited, even if the ruling is based solely on intended results. This is also based on the verse: "Do not enjoin each other in sin and transgression" [5:2], which is an admonition that warrants prohibition. Once the sale is deemed prohibited, it is automatically deemed invalid.¹³²

4.3.8 Two sales in one & conditions in sales

It is accepted that the Prophet (pbuh) has forbidden two sales or two conditions in one sale, based on the following *Hadīths*: 'Abu Hurayra (mAbpwh) is narrated to have said: "The Prophet (pbuh) prohibited two sales in one", and 'Amr ibn Shu'ayb narrated on the authority of his father that his grandfather said: The Messenger of Allāh (pbuh) said: "The following are not permitted: a loan and

¹³⁰ *'Uṣūl Al-Buyūc Al-Mamnūc a* (p.105).

¹³¹ Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.267), 'Ibn Al-Humām ((Hanafī), vol.8, p.127), Al-Tahāwī ((Hanafī), p.280).

¹³² Ibn Qudāmah (, vol4, p.222 onwards), *Al-Muwāfaqāt* by Al-Shāṭbī (vol.2, p.361).

sale in one transaction, two conditions in one sale, profits on goods that were not guaranteed, and selling that which you do not have".¹³³

There have been differences over the definition of "two sales in one". Al-Shāfi'ī said: "It can be interpreted in two ways: In one case, the seller may say: 'I have sold you this good for 2,000 deferred or 1,000 in cash immediately, take whichever you wish.' It is assumed in this case that the sale is binding at one of the two prices, and this is a defective sale (i.e. invalid)¹³⁴ since it introduces confusion and suspends the sale. In the second case, the seller may say: 'I have sold you my house on the condition that you sell me your horse'."

The reason for prohibiting the first contract is the *gharar* it contains due to ignorance regarding the price, since the buyer does not know at contract time which price will be relevant.

The reason for prohibiting the second contract is to avoid potential exploitation of the needs of others. Thus, if the buyer needs to purchase an item, the seller's condition that the buyer must sell him something may be construed as a form of exploitation and belie the mutual agreement necessary for a sale contract. Moreover, this contract also contains *gharar* since the seller does not know whether or not the second sale will take place.

There have also been differences over the interpretation of "two conditions in one sale". One interpretation is that a seller may say: "I have sold you for X in cash, or for Y deferred". Another interpretation is that the seller may make it a condition of the sale that the buyer will not sell the good or give it as a gift. A third interpretation is that a seller may say: "I have sold you this good for X, on condition that you sell me this other good for Y".¹³⁵ Yet another interpretation is that a person may lend him an amount of money in the form of a measure of wheat. Then, when the term of the loan expires, and the lender requests the return of his wheat, he says: sell me the measure you owe me for two months in exchange for two measures. Thus, it becomes two sales in one, since the second sale was initiated before the first was completed. In this case, the worse of the two deals – which is the first – is returned to him.

We thus see that two sales in one and two conditions in one sale effectively mean the same thing. Jurists differed on the status of this sale.

- The Ḥanafis ruled that it is a defective sale since it is unknown whether the price in the sale is the immediate or the deferred one, and the sale is

¹³³Narrated by 'Aṣhab Al-Sunan, also narrated by 'Ahmad on the authority of ^cAmr ibn Shu'ayb on the authority of his father on the authority of his grandfather (^cAbdullāh ibn ^cAmr ibn Al-^cĀs). Al-Tirmidhī ruled that this is a good (*hasan*) and valid (*sahīh*) *Hadīth*. Ibn Mājah narrated an abridged version including only "profits from goods that were not guaranteed, and selling that which you do not have". What is meant by "profits from goods that were not guaranteed" is that the seller is forbidden from taking profits from merchandise that he never guaranteed, e.g. if he buys a good and sells it to another before receiving it from the first seller; this sale is invalid, and its profits are not permitted since the object of sale is still being guaranteed by the first seller and not the buyer, c.f. Al-Ḥāfiẓ Al-Zaylā'ī (1st edition, (*Hadīth*), vol.4, p.18), Al-Shawkānī (, vol.5, p.179).

¹³⁴tr.: recall that for the non-Ḥanafis defective and invalid sales are the same.

¹³⁵Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.5, p.37), Al-Shawkānī (, vol.5, pp.151-153), Al-San^cānī (2nd printing, vol.3, p.16 onwards).

thus suspended. If the confusion is resolved and the sale is accepted in one of the two forms, the contract is valid.¹³⁶ The reason for the prohibition of two sales in one is: (i) that the price is not determined when one object is sold for two different prices; (ii) suspension on a future condition in the sale of one item conditional on the buyer selling him something else; and (iii) the clear involvement of *ribā* in the case of selling a measure of wheat.

- The Shāfi‘īs and the Hanbalīs ruled that this contract is invalid. Since the seller has not determined a single price, they argue, the ensuing ignorance deems this to be a *gharar* sale. They draw an analogy between this contract and the seller saying: “I sold you either this item or that item”, or “I sold you one of my houses”.¹³⁷ Since the price is unknown, this is invalid in the same manner that selling based on an unknown code is invalid.
- Mālik ruled that this sale is valid, and considered as a sale that contains an option for the buyer. The contract is then determined ex post by the actions of the contractors, as though the buyer said: “I take it with a deferred price of Y”, and the seller said: “then take it”, or “I accept”, in which case the contract conditions are satisfied.¹³⁸

Notice that the *Hadīth* prohibiting two sales in one is weak due to the presence of a doubtful authority in its chain of narration (Muhammad ibn ‘Amr ibn ‘Alqama, whose integrity was questioned by more than one authority). Even if the *Hadīth* is valid, it applies only if the seller says: “I sold you for X cash-and-carry or Y deferred”. However, if he says in the beginning only: “I sold you for Y deferred”, and the specified deferred price was higher than the day’s cash price, the sale is valid.¹³⁹

4.3.9 Deferred price and installment sales

The Shāfi‘īs, Ḥanafīs, Mālikīs, Ḥanbalīs, Zayd ibn ‘Alī, Al-Mu’ayyad Billāh, and the majority of jurists ruled it valid to sell an object immediately, with a deferred price – possibly paid in installments – greater than its cash price. They ruled these sales valid as long as the contract is independently specified as such, and contains no ignorance as in the case of two sales in one.¹⁴⁰ ’Ibn Qudāmah () said: “It is agreed that sale with a deferred price is not forbidden, and it is not reprehensible”. Thus, if an agreement is reached to purchase a machine or

¹³⁶ Al-Kāsānī ((Hanafi), vol.5, p.158), ’Ibn ‘Abidīn ((Hanafi), vol.4, p.30).

¹³⁷ Abū-’Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.267), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.31), ’Ibn Qudāmah (, vol.4, p.234).

¹³⁸ Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.153), Al-Bājī Al-’Andalusī (1st edition (Mālikī), vol.5, p.37). ’Ibn Juzayy ((Mālikī), p.257) said: “two sales in one is where one object is sold for two prices, or one of two items is sold for a single price. In the first case, the seller says: ‘I sold you this dress for 10 in cash or 20 deferred’, assuming that the sale is binding for one of the two offers. The second form is where the seller says: ‘I have sold you one of those two dresses for so much’, assuming that the sale is binding for one of them.” ’Ibn Juzayy considered this sale to be one of the ten prohibited *gharar* sales.

¹³⁹ Al-Shawkānī (, vol.5, p.152).

¹⁴⁰ Al-Shawkānī (, vol.5, p.152 onwards), ’Ibn Qudāmah (, vol.4, p.176).

commodity for 1,100 in deferred price – possibly paid in installments – despite its cash price being 1,000, the sale is valid even if two prices (the cash price and the installments price) are mentioned during bargaining, but one of them is used finally to conclude the contract. However, consider the case where the seller makes the single offer: “I sold you for 1,000 cash, or 1,100 in installments”, and the buyer says: “I accept”, without specifying which of the two contracts he wants. In this case, the contract is invalid for the majority of scholars, and defective for the Ḥanafis, due to its containing ignorance (*jahāla*). Some of the Zaydīs ruled that the sale of an item for [a deferred price] more than its cash price is forbidden, due to deferment.

In reality, sale with a deferred price, possibly paid in installments, are different from *ribā*, even though they are similar in the increase of the price due to deferment. The difference is that Allāh has permitted sales to meet man’s needs, and has forbidden *ribā* since the increase is purely due to deferment of payment. Moreover, *ribā* is an increase in the same genus of what one of the two parties to the contract pays in return for deferment. For example, an exchange of one container of wheat for one and a half containers of wheat to be paid later, or a loan of 1,000 *Dirhams* to be paid back as 1,100 in a few months are forbidden *ribā*. However, in a sale with deferred price, or a price paid in installments, the object of sale is a commodity the value of which is 1,000 currently, and 1,100 in a few months. This is not *ribā*, but it is an ease in sales, since the buyer receives the merchandise, and not money. Thus, what the buyer pays is not of the same genus as what he receives. It is well known that any good is preferred and has more value currently than the same good deferred to be delivered in the future. Islamic law does not conflict with the nature of things in this case, since the object of sale and price are not of the same genus. Moreover, the seller of an object for a price to be paid in installments is sacrificing a benefit in order to make the object available to the person who is buying it with a deferred price. This sacrifice is made due to the suspension of delivery of the price, thus not being able to use it to purchase more merchandise. Thus, the increase in the deferred price may be viewed as a compensation to the seller.

4.3.10 Purposeful sale of appertainings

- If an item belongs to another, but is sold independently, e.g. selling the fat, leg, or head, of a live sheep, then the Ḥanafis ruled that this sale is invalid. Thus, this sale is void, and is not concluded. In this case, the object of sale does not exist, since the flesh of the sheep does not become “meat” until the sheep is slaughtered and skinned.
- Similarly, if a person sells a jewel that is found out to be made out of glass, or if he sells a piece of wool, only to be found out to be cotton, then the sale is not concluded since the object of sale does not exist.
- In the case of selling a sleeve from a dress, if the dress would be damaged by cutting, then the contract is defective, since the object of sale belongs to another and cannot be delivered without harming the other.

- Similarly, the sale of a wooden beam out of a ceiling or a brick out of a wall renders the contract defective.
- However, if the sleeve is cut out of a dress, or the wooden beam is separated from the building and handed out to the buyer before he nullifies the contract, then it returns valid since the corrupting factor was removed prior to the nullification of the contract. However, if the seller does the same after the buyer has nullified the contract, then it is not permitted.
- If the object of sale is not damaged by portioning, such as a measure of grain out of a heap or 10 grams of gold or silver out of a melted bullion, then the sale is permissible. In this case, there is no harm in choosing an element out of many, and the object of sale does not belong to another.¹⁴¹

4.3.11 Sale of property before receiving it

The Ḥanafīs ruled that it is not permitted to resell a movable object of sale prior to receiving it. This ruling is based on the Prophet's (pbuh) prohibition of selling that which has not been received.¹⁴² Prohibition deems that which is prohibited defective. Moreover, this sale contains *gharar* due to the possibility of voiding the contract if the object of sale perishes. In this case, the buyer does not know if the object of sale will still exist, or if it will perish prior to receipt. Thus, the first sale is deemed invalid, and the second is deemed void. The Messenger of Allāh (pbuh) has forbidden sales that contain *gharar*.¹⁴³

As for immovable objects, such as land and houses, 'Abū Ḥanīfa and 'Abu Yūsuf ruled that they prefer the opinion that it is valid to sell such items prior to gaining possession. They base their opinion on the general permissibility of sales, and that it is not valid to restrict this generality based on a *Hadīth* with very few chains of narration. Moreover, there is no *gharar* in immovable objects such as buildings, since there is no major threat of perishing or change in the object of sale.¹⁴⁴ In summary, the reason for which the Ḥanafīs ruled for non-permissibility of selling an item before receiving it is *gharar*.

The Mālikīs ruled that it is not valid to sell foodstuffs prior to receipt whether or not their genus is subject to *ribā*.¹⁴⁵ Their proof is the *Hadīth* of 'Ibn 'Abbās and 'Ibn 'Umar that the Messenger of Allāh (pbuh) said: "Whoever buys food,

¹⁴¹ Ibn Al-Humām ((Ḥanafi), vol.4, p.193), Al-Ķāsānī ((Ḥanafi), vol.5, p.139 onwards), 'Ibn c-Ābidīn ((Ḥanafi), vol.4, p.114).

¹⁴² A number of *Hadīths* are narrated to this effect, including the one narrated by 'Abu Dāwūd on the authority of 'Ibn 'Umar that Zayd ibn Thābit told him: The Messenger of Allāh (pbuh) has forbidden re-selling an object in the same place where it is purchased, until the merchants have taken it to their caravan. Narrations of this *Hadīth* have been mentioned previously.

¹⁴³ Narrated by Muslim, 'Ahmad, and 'Aṣḥāb Al-Sunan Al-'Arba'a, and documented above.

¹⁴⁴ Al-Sarakhsī (1st edition (Ḥanafi), vol.13, p.8 onwards), Al-Ķāsānī ((Ḥanafi), vol.5, p.234), 'Ibn Al-Humām ((Ḥanafi), vol.5, p.264), *Mukhtaṣar Al-Tahāwī* (p.84).

¹⁴⁵ Foodstuffs for the Mālikīs include all items for which *zakāh* is prescribed, including grains and fats such as oil, and honey, etc.

he should not sell it until he receives it".¹⁴⁶ However, other goods, and food that was purchased gross-sale, may be sold prior to receipt.¹⁴⁷

The reason behind prohibiting the sale of food prior to its receipt in the Mālikī school is the possibility of its use as a means of effecting *ribā al-nasi'a*. Its similarity to selling food for food with deferment necessitates its prohibition to avoid means for circumventing the Law.

The Hanbalis ruled that the sale of food prior to its receipt is not permissible if the food is measured by volume, weight, or number. This opinion is based on the ease with which foodstuffs measured by such means can be received. The specific mention of food in the above cited *Hadīth* suggests that selling items other than food prior to receipt is permissible, especially that no other valid *Hadīth* on the prohibition of selling items prior to their receipt is cited. The condition of measurability by volume, weight, or number is chosen due to fact that the liability (*damān*) for such items is only transferred from the seller to the buyer through measurement. In this regard, the Messenger of Allāh (pbuh) has forbidden the sale of items that are not guaranteed. Thus, the Hanbalis prohibit this sale, like the Hanafīs do, based on *gharar*. Items that are not measured by volume, weight, or number, may be sold prior to receipt.¹⁴⁸

Al-Shāfi‘ī, Muhammad ibn Al-Hassan, and Zufar ruled that it is not permissible to sell items, movable or immovable, for which the seller's ownership is not complete. They base their opinion on the generality of the prohibition of selling that which was not received by the seller. The relevant narration is by Ahmad on the authority of Ḥakīm ibn Ḥizām (mAbpwh) who said: "I said: 'O Messenger of Allāh, I make many trades, which of them are permissible for me and which are prohibited?'. He (pbuh) said: 'If you buy something, do not sell until you receive it', and He (pbuh) said: 'the following are not valid: a loan and sale in one, profits made on items that were never guaranteed by the seller,¹⁴⁹ and the sale of that which you do not have'."

In this case, selling items that are not completely owned by the seller is classified under sales of items that he never guaranteed. Their proof is based on the following logical argument: This is an invalid sale due to the inability of the seller to deliver the object of sale. Moreover, the ownership of the object which may result from this sale would not be complete, since the object may perish, thus voiding the contract. It is also not permissible since it contains *gharar* without a compelling necessity.¹⁵⁰ Thus, the reason for prohibiting this

¹⁴⁶The *Hadīth* of 'Ibn 'Abbas was narrated by Al-Bukhārī, Muslim, 'Abu-Dāwūd, Al-Tirmidhī, and Al-Nasā'i. The *Hadīth* of 'Ibn 'Umar was narrated by 'Ahmad and 'Ashāb Al-Kutub Al-Sitta except for Al-Tirmidhī. See 'Ibn Al-'Athīr Al-Jazarī (, vol.1, p.383), Al-Haythamī (, vol.4, p.98), Al-Shawkānī (, vol.5, p.158).

¹⁴⁷'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.142 onwards), Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.4, p.279), 'Ibn Juzayy ((Mālikī), p.258).

¹⁴⁸'Ibn Qudāmah (, vol.4, pp.110,113 onwards).

¹⁴⁹One explanation of this prohibition of *bay' mā lam yadman* is that it refers to the sale of that which was not received by the seller. This explanation is based on the fact that if the object of sale were to perish prior to receipt by the first buyer, he is not liable for its loss of value as it is still a liability on the first seller. This *Hadīth* was authenticated above.

¹⁵⁰Abū-'Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.364), Al-Shāfi‘ī ((Shāfi‘ī), vol.2, p.66), Al-

sale in the Shāfi‘ī school, as in the Hanafī school, is *gharar*.

I find it more compelling that the reason for prohibiting the sale of that which has not been received is its similarity to *ribā*: as the buyer pays the money to the seller, then sells it prior to receiving it, he has thus paid a certain amount of money and gained a profit based solely on paying it to the original seller without having to do any work. This is very similar to *ribā*.¹⁵¹ Moreover, this sale contains *gharar* due to the inability of the original buyer to deliver the object of the second sale. Thus, the reasons for prohibiting the sale of items that have not been received are in fact the conjunction of all the ones given by the jurists of the major schools.

4.3.12 Conditionality of deferment

If deferment is made a condition for the delivery of a specific (non-fungible) object of sale or price, then the Ḥanafīs deem the sale defective. This follows since the default requirement in a sale contract is delivery at the contract session. This in turn follows from sales being commutative contracts, where the exchange of ownership is effected through the mutual exchange of possession. Deferment negates the requirement to deliver immediately, thus changing the nature of the contract and rendering it defective.

However, it is permissible to defer the object of sale in forward sales (*salam*). As a matter of fact, this type of sale is not permissible without deferment for the Ḥanafīs. Similarly, it is permissible to defer the price as a liability on the buyer if the term of deferment is known. This follows since deferment is natural for fungibles, where deferment allows the buyer to earn the price during the specified deferment period. This is in contrast to chattel, for which deferment does not serve a similar purpose.¹⁵²

4.3.13 Sales with defective conditions

For clarification of the discussion of this issue, it is necessary to list the types of conditions in sale contracts. There are three types of conditions for the Ḥanafīs: valid, defective, and invalid.¹⁵³

Valid conditions (*al-shart al-sahīḥ*)

Valid conditions, which are legally accepted and binding on the contracting parties, are classified into four categories:

1. **Conditions that are requirements for the contract.** Those include the cases where a person purchases an item on condition that: (i) the seller

Khatīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.68).
¹⁵¹ ‘Usūl al-Buyū‘ Al-Mamnū‘a (p.74).

¹⁵² Al-Kāsānī ((Hanafī), vol.5, p.174), ‘Ibn ‘Abidīn ((Hanafī), vol.5, p.23).

¹⁵³ Al-Kāsānī ((Hanafī), vol.5, pp.168-172), Al-Sarakhsī (1st edition (Hanafī), vol.13, pp.13-18), ‘Ibn Al-Humām ((Hanafī), vol.5, p.214 onwards), ‘Ibn ‘Abidīn ((Hanafī), vol.4, p.126 onwards), ‘Aqd Al-Bay‘ by Professor Muṣṭafā Al-Zarqā‘ (p.27).

delivers the object of sale, (ii) the buyer owns either the price or the object of sale, (iii) the seller withholds the object of sale until the price is paid in full, etc. Such conditions articulate the requirements of the contract, since the establishment of ownership, exchange of possession, and withholding of the object prior to the delivery of the price are among the requirements of commutative contracts.¹⁵⁴

2. **Conditions that are legally permitted.** Such conditions include deferment and options to one of the contracting parties that were legally documented based on the actions of the Prophet (pbuh). Thus, deferment to a specified term is permitted to meet the needs of people. Similarly, the permissibility of conditional options for a specified term to conclude or void a sale has been documented through the saying of the Prophet (pbuh) to Ḥibbān ibn Munqidh: “If you trade, then say: ‘no wheedle’, and I have an option for three days”.¹⁵⁵ This issue will be discussed in greater detail in our discussion of options, and it is based on juristic approbation. However, analogy dictates that the condition is defective since it negates a requirement of the contract, which is the establishment of ownership for both price and object of sale immediately and simultaneously.
3. **Conditions that are conforming with the requirements of the contract.** Examples include sale with a deferred price, with a condition that the buyer provides a guarantor or a pawned object to cover the price. In this case, a guaranty or a pawned object are methods of documenting and insuring the delivery of the price. They are thus in conformity with the requirements of the sale contract, and eligible for delivery. This condition requires further investigation, since the guarantor or pawned object may or may not be known, and we need to determine whether a transfer of liability has the same legal status as a guarantee or pawned object.¹⁵⁶
 - If the pawned object or the guarantor are not known, then the sale is defective. for instance, if the seller says: “I sell you on condition that you pawn an object of equal price with me”, without specifying the object to be pawned, or if he says: “on condition that you find a guarantor for the price”, without specifying a particular person, the sale is defective. The ignorance (*jahāla*) that ensues from such a contract may lead to dispute and prevent the exchange of price and

¹⁵⁴ Al-Kāsānī ((Hanafi), ibid, p.171).

¹⁵⁵ This *Hadīth* was narrated by Al-Ḥākim in *Al-Mustadrak* on the authority of 'Ibn 'Umar as: “Sell, and say: ‘no wheedle’”, and in the narration in Al-Bayhaqī, it is: “If you trade, then say: ‘no wheedle’”, then you have the option for every good you purchase for three nights, if you are satisfied then keep it, and if you are not then return it”. It was also narrated by Al-Bukhārī, Muslim, Abū Dāwūd, Al-Nasā'ī, and in *Al-Muwatṭa'* as: “Whomsoever you trade with, then say: ‘no wheedle’.” Here, “no wheedle” means “it is not permissible for you to deceive me”, or “do not make your deception binding upon me”. See Al-Ḥāfiẓ Al-Zaylā'ī (1st edition, (*Hadīth*), vol.4, p.6), 'Ibn Al-'Athīr Al-Jazārī (, vol.1, p.414), Al-Samarqandī (Hanafi), vol.2, p.82).

¹⁵⁶ Al-Kāsānī ((Hanafi), ibid, p.171 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.13, p.18).

object of sale. This follows since, without specification, the assurance and certainty of receiving the price through the pawning or guaranty is only realized through delivery. This purpose is thus not satisfied if the pawned object or guarantor are not known.

- If the two parties to the sale agree on a specific pawned object during the sale session, then the sale is permissible. Thus, the obstacle of ignorance about the object to be pawned has been removed, realizing the same effect that would have occurred had the object been known from the beginning. This follows since the contract session is treated as a single time unit.
- Similarly, if they do not agree on an object to be pawned, but the buyer pays the price in cash during the contract session, then the sale is valid. In this case, the purpose of pawning, which is the eventual delivery of the price, has taken place. Thus, the contractual aspect of pawning is dropped.
- However, if the contract session ends without specifying the pawned object or paying the price in cash, then the sale is defective. In this case, the full mutual agreement of the contracting parties is suspended based on the nature of the pawned object that satisfies the condition in the contract. Thus, without the specification of the object of pawning, the true mutual agreement (without which no sale is valid) has not been achieved.
- If the object of pawning, or the guarantor, are known by identification or naming, then the ruling based on analogy is that the sale is defective. This is the opinion endorsed by Zufar. This opinion is based on the principle that a condition that is incompatible with the requirements of the contract is defective originally. In this context, the condition of pawning an object or specifying a guarantor are in conflict with the requirements of the contract, and are thus defective.
- The opinion based on juristic approbation of the most beneficial outcome is that such a condition is valid, and this is the best supported opinion for the majority of Hanafi jurists. Their argument is that even though this condition is in conflict with the requirements of the contract in form, it conforms with it in substance, since a pawned object or a guarantor are legal means of insuring delivery of the price. The seller's right is thus guaranteed by pawning or guaranty, rendering each in conformity with the intent of the contract requirements. In this sense, such a condition is similar to one that requires high quality of the price to be delivered.

Note that the validity of permitting a sale with the condition of guaranty is preferably restricted to the case where the guarantor is present at the contract session, and accepts the guarantee. An exception is that he may be absent at the time of the contract, but arrives during the contract

session and accepts. This follows naturally since the contract session is the relevant locus for the contract. However, if the guarantor was (i) absent, (ii) did not accept, or (iii) accepted in absentia, then the guarantee is not valid. In this case, the objective of guarantee has not been realized, and the ruling according to analogy will remain in effect. This follows since the guarantor's liability to pay the price was caused by the sale, which gives him the status of the buyer if the guarantee is a condition for the sale. Since the presence of the buyer in the contract session is a condition for the validity of the seller's offer, thus the presence of the guarantor in this case is similarly necessary.

The case of a guarantor is contrasted with the case of a pawned object, where that object need not be present at the contract session. In this case, the pawned object is a liability on the buyer, who is present and commits to the pawning, thus rendering it valid. In this case, if the buyer does not deliver the pawned object to the seller, the status of the pawning is not established. This follows since pawning requires delivery. Then, once delivery of the pawned object is completed, the contract is concluded.

If, following the agreement, the buyer refuses to deliver the pawned object, Zufar ruled that he may be forced to deliver it. Once the pawned object is accepted as a condition of a contract, its delivery becomes one of the rights guaranteed by that contract. It follows that enforcement of delivery of the pawned object is one of the rights that must be fulfilled.

The majority of Ḥanafi jurists ruled that the buyer is not to be forced to deliver the pawned object, since pawning is originally viewed as a voluntary contract. Thus, making it a condition in a sale does not change its voluntary nature, and enforcing a voluntary contribution is not legally allowed. In this case, the buyer is not forced, but he should be told: "you must deliver the pawned object, pay its value or price, or void the sale". This follows since the seller was only satisfied with making the price a liability on the buyer based on the guarantee offered by the pawned object. If the buyer refuses to do any of the above, then the seller has the right to void the sale, since he would not achieve his objective from the contract.

A **transfer of liability** (*al-hawāla*) may be issued by the buyer or the seller. If the seller stipulates a condition in the sale that the buyer transfers the liability for the price to a debtor of his, then we must consider two cases:

- (a) If liability for the entire price is transferred, then the sale is defective. This follows since the sale would thus be one with a condition that the price be a liability on a party other than the buyer, which is invalid due to conflicting with requirements of the contract.
- (b) If the seller makes it a condition that half the price be transferred in liability to a specific third person, then the sale is valid if that third party is present and accepts the transfer. If the third party was not

present but arrives during the contract session, and accepts, then the sale is valid.

If the buyer stipulates a condition in the sale that the seller transfers the liability for the price to one of his (the buyer's) debtors, or if the seller makes it a condition that the buyer guarantees the price to a creditor of the seller, then the sale is defective.¹⁵⁷ This follows since the transfer and guarantee conditions are not requirements of the contract, but they are rather conditions to benefit the parties to the contract. Conditions that are not requirements of the contract are originally defective, unless they are in conformity with the requirements and effects of the contract and reinforce them. The transfer of liability is a means of absolving the buyer from liability for the price, which is not in conformity with the requirements of the contract. This is in contrast to guaranty and pawning.

4. Conditions that are accepted by convention: For instance, purchasing a lock on the condition that the seller will affix it to a door, or a shoe on the condition that the seller will finish it, or appliances with a repair warranty condition, are all deemed valid on the basis of juristic approbation. However, the opinion based on analogy is that such sales are not valid, which is the opinion of Zufar.

- The argument based on analogy is that such conditions are not requirements of the contract, and provide a benefit to one of the two parties of the contract. Thus, such conditions are deemed defective, in the same manner that purchasing cloth on the condition that the seller will sew it into a shirt would be defective.
- The argument based on juristic approbation is that people have included such conditions in sales for a long time, and it is very similar to commissioning to manufacture (*'istisnā'*). Thus, the ruling based on analogy is overruled in the same manner that it is overruled in the case of *'istisnā'*.

Defective condition (*al-shart al-fāsid*)

A “defective condition” is one that renders the contract in which it was stipulated a defective contract. All conditions that are not covered by the above enumerated four categories of valid conditions (those that are (i) requirements of the contract, (ii) conforming with those requirements, (iii) based on legal precedent, or (iv) accepted by convention) are deemed defective. Thus, conditions that do not meet any of those four criteria and are simply stipulated to obtain extra benefits for one of the parties to the contract are deemed defective. Examples of such contracts include: (i) buying wheat on condition that the seller will grind it, (ii) buying cloth on condition that the seller will sew it into a shirt, (iii) buying wheat on condition that it will be kept in the seller's house

¹⁵⁷ Al-Kāsānī ((Hanafī), vol.5, p.172).

for a month, (iv) selling a house with a condition that the seller will continue to live in it for a month, (v) selling land on the condition that the seller will continue to cultivate it for a year, or an animal on the condition that he will ride it for a month, and (vi) sales with a condition that the buyer will make a loan to the seller, or give him a gift, etc. All such sales are defective, since any additional benefit that is made a condition for the sale is considered *ribā*. Such benefits are an increase in a sale contract without compensation, which is the very definition of *ribā*. In this regard, all sales that contain, or are suspected to contain *ribā* are defective.¹⁵⁸

3. Invalid and nugatory conditions (*al-shart Al-laghw* or *al-bātil*)

This category is comprised of conditions that result in a net harm to one of the parties of the contract. For instance, a sale with a condition that the buyer may not sell the item or give it as a gift is considered a permissible sale with an invalid condition for the majority of Hanafis. They ruled thus since the condition does not result in a benefit for either party, and thus does not render the contract defective. Indeed, the defectiveness of a sale based on this type of condition would have to be based on *ribā*, which requires an extra benefit for one of the parties.¹⁵⁹

It is notable that the Hanafis agree that it is valid for one of the parties of the contract to append a valid condition (e.g. a valid option) to the contract ex post. In contrast, 'Abū Ḥanīfa ruled that attaching a defective condition to an otherwise valid contract renders it defective, whether the defective condition is linked to the contract at its inception (*qirānuhu bihi*) or appended to it ex post (*'ilhāquhu bihi*). This follows in his opinion since legal consideration must be given to the actions of an eligible party to the contract.

'Abū Yūsuf and Muhammad, on the other hand, ruled that the defective appended condition is not attached to the contract, and the contract is not deemed defective. In this case, the defective appended condition is considered nugatory (*laghw*), since if it is accepted, it would render an otherwise valid contract defective. Since this transformation is not valid, the contract remains valid. In general, they ruled that appending a valid condition is an exception to the general rule that renders the appending of all conditions invalid. This general ruling is based on the expiration of the language of the contract, which makes it invalid to add new conditions. The case of appending a valid condition is exempted from this general ruling to satisfy legitimate needs.¹⁶⁰ The more correct of the two opinions is that of 'Abū Yūsuf and Muhammad, as reported by 'Ibn 'Abidīn based on *Jāmi'* *Al-Fuṣūlayn*.¹⁶¹

¹⁵⁸ Al-Kāsānī ((Hanafi), vol.5, p.169), Al-Sarakhsī (1st edition (Hanafi), vol.13, pp.15,18), 'Ibn 'Abidīn ((Hanafi), vol.4, p.126), 'Ibn Al-Humām ((Hanafi), vol.5, p.214).

¹⁵⁹ Al-Sarakhsī (1st edition (Hanafi), vol.13, p.15), Al-Kāsānī ((Hanafi), vol.5, p.170), 'Ibn Al-Humām ((Hanafi), vol.5, p.111).

¹⁶⁰ Al-Kāsānī ((Hanafi), vol.5, p.176), 'Ibn Al-Humām ((Hanafi), vol.5, p.227).

¹⁶¹ 'Ibn 'Abidīn ((Hanafi), vol.4, p.127).

Status of a sale with an attached condition for non-Hanafis

It is well known that a non-valid sale may be characterized interchangeably for the non-Hanafis as defective (*fāsid*) or invalid (*bātil*), with no distinction between the two notions. Thus, if the attachment of a condition to a contract renders it non-valid, it may be equivalently called defective or invalid. A sale with an attached condition is called *bay' al-thunyā*, and the jurists differed on its status.¹⁶² We have discussed the Hanafi positions above. The Shāfi'īs ruled based on a *Hadīth* that the sale is rendered defective. The Ḥanbalīs ruled that the sale and the condition are both rendered valid, since they do not accept the above mentioned *Hadīth*. The Mālikī views will be discussed in detail below.

The Shāfi'ī position is as follows:¹⁶³

- If a condition that is a prerequisite for the contract (e.g. that the object of sale be delivered, or a defective good returned, etc.) is attached to the contract, then the contract is valid. In this case, the attached condition is considered a clarification of the contract's prerequisites.
- The contract is also deemed valid if a valid condition (e.g. an option, a deferment, a pawning, or a guaranty) is attached to it, even if such a condition results in a benefit for one of the parties of the contract, and it is not a prerequisite for the contract. In this case, the validity of the contract relies on the legal validation of the condition, and the legitimate need it meets.
- Other conditions that are contrary to the prerequisites of the contract render the sale invalid. Examples include conditions that the buyer may not resell the item or give it as a gift; that the buyer either accepts to buy an item or to lend the seller some money; that the seller of a house be allowed to live in it for some time; that the seller of a cloth must sew it into a dress for the buyer; that the seller of a crop reaps it for the buyer; or that the seller of a piece of leather must sew it into a shoe for the buyer. In all such cases, the sale is rendered invalid based on the *Hadīth* that the Prophet (pbuh) prohibited a sale with an attached condition (*bay' wa sharf*).¹⁶⁴

The Ḥanbalīs¹⁶⁵ have ruled that the attachment of two conditions to a sale renders it invalid, whereas the attachment of one condition does not. They base

¹⁶² *Al-thunyā* refers to excluding ('istithnā') one part of the object of sale. If what is being excluded from the sale is known, e.g. one of the trees, one of the houses, or a known lot of land, then the agreement and the sale are valid. However, if what is being excluded is unknown, then the sale is not valid.

¹⁶³ Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.31), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, pp.265,268).

¹⁶⁴ Narrated by ^cAbd Al-Ḥaqq in his *Al-'Aḥkām* on the authority of ^cAmr ibn Shu'ayb on the authority on his father on the authority of his grandfather. It was also narrated by 'Abū Ḥanifa.

¹⁶⁵ Ibn Qudāmah (, vol.4, pp.224-226,235), Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.23 onwards).

this ruling on the *Hadīth* that the Prophet (pbuh) said: “The following are not permissible: a loan and a sale in one transaction, two conditions in one sale, or selling that which is not in your possession”.¹⁶⁶ What is meant by “two conditions” are conditions that are not among the standard benefits accrued from the contract. Examples include the cases where a person buys a cloth and makes it a condition that the seller sews it into a dress and shortens it, or buys grains and makes it a condition that it is milled and carried to a destination. In those cases, making only one of the conditions would render the sale permissible.

The Ḥanbalis divide conditions into four categories:

1. Conditions that are among the prerequisites of the contract; e.g. the condition of delivery, option during the sales session, and immediate exchange. Such conditions are redundant, and thus do not result into a change of status for the contract.
2. Conditions that result in an extra benefit to one or both parties of the contract; e.g. deferment, options, pawning, guaranty, certification, or description of specific characteristics of the object of sale. Those are permissible conditions that must be fulfilled. ’Ibn Qudāma said that he does not know of any disagreement over the validity of those first two categories of conditions.
3. Conditions that are not among the prerequisites of the contract or its standard benefits, but that are not in conflict with the prerequisites. There are two sub-categories of such conditions:
 - (a) Conditions pertaining to the object of sale that result in a benefit to the seller: In this case, one condition is acceptable. Examples include: if the buyer makes it a condition that he (the buyer) will sew the cloth he buys into a dress; if a condition is made that a pile of wood is carried to a specified destination; that the seller be allowed to live in a house he sold for a month; and that the seller be carried on an animal he sold to a specific place. The proof of the permissibility of those conditions is the *Hadīth* of Jābir that the Prophet (pbuh) bought a camel from him, and stipulated a condition that he will carry him on that camel to his house in Madīnah.¹⁶⁷
 - (b) Conditions that incorporate one contract in another: Examples of this type of condition include: selling a person an item with a condition that he would sell him another item, buy from him another item, rents an object to him, marry him to someone, lend him some money, etc. This type of condition is defective and renders the sale defective due to the prohibition of two sales in one.

¹⁶⁶Narrated by ’Abū Dāwūd and Al-Tirmidhī on the authority of ^cAbd Allāh ibn ^cAmr. Al-Tirmidhī deemed it a valid and good narration (*Hadīth hasan saḥūh*).

¹⁶⁷This is the meaning of the *Hadīth*, which was narrated by ’Aḥmad, Al-Bukhārī, and Muslim on the authority of Jābir, c.f. Al-Shawkānī (, vol.5, p.178).

4. Conditions that are in conflict with the prerequisites of the contract: Examples of this type of condition include a seller who adds a condition that the buyer may not resell the item or give it as a gift, or a condition that the buyer must sell the item or must make it a trust. There are two reported opinions of 'Ahmad pertaining to this type of condition, the more valid of which is that the sale is valid, and the condition is invalid.

The Mālikīs distinguish between the following cases:¹⁶⁸

- If the condition restricts the buyer's ability to make a private or public transaction, then the condition and sale are rendered invalid. For instance, the sale is not permissible if the seller attaches a condition that the buyer may not resell the object or give it as gift. This condition renders the sale a *bay' al-thunyā*, and the Prophet (pbuh) has forbidden the *thunyā* unless it is known.¹⁶⁹ If this condition is dropped, then the sale becomes valid.
- If the seller stipulates a condition that benefits himself, e.g. riding the sold animal, or living in the sold house for a known short period (e.g. a month, up to a year in some opinions), then the sale with the attached condition is valid. This is based on the above cited *Hadīth* of Jābir.
- If the seller stipulates a condition that results in a corruption in the price, then the sale is permissible, while the condition is invalid. For instance, if the seller makes it a condition that "the sale is void if the price is not delivered for three days", the condition is invalid, but the sale is valid. However, if the seller says to the buyer: "whenever I return the price to you, you return the sold object to me", which is known for the Ḥanafīs as redemptive sale (*bay' al-wafā'*), then the sale is not permissible.

4.3.14 Sale of fruits and vegetables

This is a topic of great practical relevance in markets, and thus must be discussed in detail:

- There is a consensus among legal scholars that selling fruits before they are created is not concluded. This follows from the prohibition of selling that which has not yet been created, and the "multi-year sale" (*bay' al-sinīn* and *al-mu'āwama*).¹⁷⁰

¹⁶⁸Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.159 onwards), Ibn Juzayy ((Mālikī), p.259), Al-Dardir ((Mālikī)A, vol.3, p.65).

¹⁶⁹Narrated by Al-Nasā'ī and Al-Tirmidhī (who deemed it valid = *sahīh*) on the authority of Jābir, c.f. Al-Shawkānī (, vol.5, p.151).

¹⁷⁰The prohibition of selling that which has not yet been created is a special case of the prohibition of selling that which is not in the possession of the seller, the sale of the fetus animal in its mother's womb, the *gharar* sales, etc. We have cited the relevant *Hadīths* for those prohibitions previously. As for the prohibition of "multi-year sale" (*bay' al-sinīn* and *al-mu'āwama*), it is narrated in a number of different ways on the authority of Jābir ibn 'Abd Allah by Al-Bukhārī, Muslim, 'Ahmad, 'Abū Dāwūd, Al-Tirmidhī and Al-Nasā'ī. In a narration of Al-Bukhārī "He (pbuh) prohibited *al-muḥāqala*, *al-muzābana*, *al-mu'āwama*,

It has been narrated that the Prophet (pbuh) “prohibited the multi-year sale of land (*bay^c al-sinīn*) and trees (*bay^c al-mu^cāwama*)”. Those were prohibited since they involve selling non-existent items, and the Prophet (pbuh) has prohibited the *gharar* sales. As we have seen, *gharar* is that whose consequences are not known. The type of *gharar* involved in those sales is the sale of an unknown item that may and may not come to existence, and whose quantity – if it comes to existence – is not known.

- The sale of fruits after they are collected (cut, *al-qat^c* or *al-ṣirām*) is unanimously deemed permissible.
- There are differences among the scholars regarding the sale of fruits on trees or plants in the ground after they are created. The Hanafis distinguish between two cases: (i) sales prior to the manifestation of the goodness of the produce, and (ii) sales after the goodness is manifested. In each case, the sale can be (a) with a condition of cutting them, (b) without any conditions, or (c) with a condition of leaving them on the tree or in the ground.
 1. If the sale is conducted prior to the manifestation of goodness of the produce:
 - (a) If it is under the condition of cutting them, then it is permissible. In this case, cutting the fruits is binding immediately, unless the buyer gives the permission to wait.
 - (b) If the sale is devoid of any conditions, then it is deemed permissible by the Ḥanafīs, and forbidden for the Shāfi‘īs, Mālikīs, and ’Alīmad. This decision was reached by the Ḥanafīs since leaving fruits on the tree is not made a condition through any legal text. Moreover, since contracts are initially devoid of any contracts, it is not permissible to restrict them with a condition of leaving the fruits on the trees without a formal proof. This is especially true if this artificial restriction of the contract renders it defective. The Ḥanafīs also reasoned that the sale is permissible since fruits are a beneficial good even if only as fodder for the animals.
 - (c) If the sale contains a condition of leaving fruits on the trees or vegetables in the earth, then the consensus among Ḥanafī jurists is to

and *al-mukhābara*”. In another narration: “The Prophet (pbuh) has prohibited *bay^c al-sinīn*”. The meaning of *al-muḥāqala* as stated in *Al-Qāmūs*: is the sale of plants before their quality is known; selling wheat in its spikes; *muzāra^ca* for a third, fourth, less, or more; or renting a land with the wheat in it. *Al-muzābana* as explained in the *Sahīhayn* (of Al-Bukhārī and Muslim), is the sale of fresh palm-dates in exchange for dried dates, or fresh grapes for raisins. *Al-Mu^cāwama* is the sale of trees for a number of years, and some have explained it as the rental of land for a number of years. Similarly, *bay^c al-sinīn* is the sale of the fruits of a palm tree for more than one year in a single contract. This is a *gharar* sale, since it involves selling that which does not [yet] exist. *Al-Mukhābara* is the rental of land in exchange for a third or fourth of the produce as rental, c.f. ‘Ibū Al-’Athīr Al-Jazarī (, vol.1, p.403 onwards), Al-Shawkānī (, vol.5, p.175), Al-Haythamī (, vol.4, p.104).

render the contract defective. Their proof is that this is a condition that is not a prerequisite of the contract, and it results in a benefit to one of the parties (the buyer). Moreover, this condition is not in accordance with the contract, and is not conventionally used by people. This type of condition renders the sale defective: e.g. if a person purchases wheat on condition that it be left in the seller's house for a month, the sale is defective. [In the case of fruits and vegetables, the buyer] cannot leave the purchased items unless he borrows the trees or the land, both of which are owned by the seller. Thus, this condition is tantamount to a condition of extending a loan, which results in a contract within a contract. As we have seen above, this inclusion of one contract in another is prohibited. Finally, they argue that this condition adds *gharar* to the contract since the buyer does not know whether the fruits will remain in good condition, or whether they will perish due to some infection. Thus, there are three reasons for rendering a sale including this condition invalid: *gharar*, a defective condition, and a contract within a contract.

2. If the sale is following manifestation of the goodness of the produce:

- (a) If the sale includes the condition of cutting the fruits or vegetables, it is permissible.
- (b) If the sale is devoid of any condition, it is also permissible.
- (c) If he sells with a condition of leaving the fruits in the trees or the vegetables in the earth, then: (i) if the object of sale has not reached its full size, then the sale is unanimously deemed defective, as shown in case (c) above; (ii) if the object has reached its full size, then the sale is considered defective for 'Abū Ḥanīfa and 'Abū Yūsuf. Their proof is that the condition of leaving the items in this case contains a benefit to the buyer, and it is neither a requirement of the sale, nor is it in accordance with the sale's requirements. In this way, it is again similar to the example of purchasing wheat on the condition of leaving it in the seller's house for a month. Muḥammad, on the other hand, deemed the condition permissible based on juristic approbation and its conventional use.¹⁷¹ The permission for Muḥammad is not based on the convention for people to add a condition of leaving the object of sale, but rather the convention of being lenient in allowing the buyers to leave the item without adding it as a condition in the sale contract. This opinion is also reported and accepted in *Al-Durr Al-Mukhtār*.

¹⁷¹ Al-Sarakhsī (1st edition (Ḥanafī), vol.12, p.195), Al-Kāsānī ((Ḥanafī), vol.5, p.173), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.102 onwards), 'Ibn Ḩāfiẓ ((Ḥanafī), vol.4, p.40), *Al-'Amwāl wa Nazariyyat Al-'Aqd* (p.307 onwards).

Status of leaving fruits after the goodness of their quality is manifested when they are sold unconditionally

In this case:

1. If the purchased items have reached full size, but still need to ripen, then the buyer does not need to purify them with charity whether he left them with or without the seller's permission, since the object of sale will not increase in size, but only change in quality. This is contrasted with plants, whose growth is of benefit to the buyer. In this case, the stem of the plant is deemed to be property of the buyer, in contrast to fruits on a tree where the tree remains property of the seller.
2. If the sold object had not yet reached its full size, then leaving it is permissible if it is with the permission of the seller. If he leaves it without the seller's permission, then he must give as charity that which has increased after the contract. In this case, the increase was corrupted by unlawfully leaving the object. To get rid of this corruption, it must be given as charity.

Status of newly-grown fruits during a waiting period not made a condition of sale

If new fruits grow on the tree, they are the seller's property whether the sold fruits were left on the tree with or without his permission. Since such fruits are a growth from the tree, which is the seller's property, they belong to him. However, if the seller makes it permissible to the buyer to take the new fruit, then he may.

If it is not clear whether the new fruits grew on the tree after the sale was concluded, we must consider two cases:

1. If the buyer had not yet been given full access (*takhlīya*) to the fruits he bought, the sale is invalid. This is the ruling of Al-Kāsānī in *Al-Badā'īc*. In this case, the mixture between the object of sale and the new fruits renders the object of sale undeliverable due to this invalidating ignorance (*jahāla*).
2. If the new fruits grew after the buyer was given full access, then the sale remains valid, since obtaining full access is tantamount to receiving the object of sale. In this case, the buyer determines the increment over what he bought, and returns that increase to the seller. The buyer is given possession, and thus the right to determine the amount of increase, due to having been given full access to the fruits.¹⁷²

The preceding was the opinion of the Hanafis regarding the sales of fruits and plants. The Mālikīs, Shāfi'īs, and Hanbalīs ruled that if the goodness of the fruits is ascertained, then it is permissible to sell them: (i) with no conditions,

¹⁷² Al-Kāsānī ((Hanafi), *ibid.*).

(ii) with the condition of cutting them, or (iii) with the condition of leaving them.

On the other hand, prior to the manifestation of goodness of the fruits, the consensus is that sales with the condition of leaving or remaining on the tree is not valid. This opinion is based on the Prophet (pbuh) having “prohibited the sale of fruits until their goodness is manifested; he prohibited both the buyer and the seller”.¹⁷³ The non-validity of this sale thus follows since a prohibition implies the defectiveness of that which is prohibited. ’Ibn Al-Mundhir said: “Scholars agreed on the universality of this *Hadīth*, based on the existence of the same risk as in the sale of non-existent objects”.¹⁷⁴

If the sale is conducted with a condition of cutting the fruits immediately, then there is a consensus that it is valid. This follows since the prohibition was based on the fear that the fruits may be ruined or maimed prior to receipt. The proof of this ruling is the narration on the authority of ’Anas that “The Prophet (pbuh) forbade the sale of fruits until they are bright. When asked: ‘what is brightness?’, Anas said: ‘turning red or yellow’. Then he said: ‘do you wonder, if Allāh protected the fruit, how then would one of you take the property of his brother?’.”¹⁷⁵ This fear of perishing of the fruits is not applicable if the fruits are cut immediately, thus rendering the sale valid as it would be if the goodness of the fruits were manifested.

’Ibn Rushd said: “Since the reason for prohibition was fear of the fruits being infected prior to ripening, scholars did not suggest that the prohibition of sale prior to ripening is unrestricted. Indeed, they interpreted the prohibition to apply to the sale with a condition to leave it on the tree until it ripens. Thus, they have allowed selling it prior to ripening with the condition of cutting immediately”.

Jurists also ruled that it is not permissible to sell green plants in the soil except with the condition of immediate cutting based on the *Hadīth* of ’Ibn ”Umar: “The Prophet (pbuh) forbade the sale of date-palms until they bear dates, wheat spikes until they turn white and there is no fear of infection; he forbade both the buyer and the seller”.¹⁷⁶ ’Ibn Al-Mundhir said: “I do not know of anyone who prefers not to follow this *Hadīth*.

If the sale is conducted prior to the manifestation of goodness of the fruits, and contains no conditions of cutting or leaving, then it is invalid. The proof of this ruling is that the Prophet (pbuh) issued an unrestricted prohibition of the sale of fruits before their goodness (ripeness, brightness) is manifested. Thus, such a sale may lead to conflict. An unrestricted contract makes it a prerequisite

¹⁷³Narrated by Al-Bukhārī, Muslim, ’Abū Dāwūd, Al-Nasā’ī, Al-Tirmidhī, and Mālik on the authority of ’Ibn ”Umar, c.f. ’Ibn Al-’Athīr Al-Jazarī (, vol.1, p.389).

¹⁷⁴Note that this claimed consensus may be questioned, since Yazid ibn ’Abī Ḥabīb and Al-Lukhmī of the Mālikī school have both permitted this type of sale with the condition of leaving the fruits on the tree, c.f. ’Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.148), Al-Bājī Al-’Andalusī (1st edition (Mālikī), vol.4, p.218).

¹⁷⁵Narrated by Al-Bukhārī, Muslim, Mālik, and Al-Nasā’ī, c.f. ’Ibn Al-’Athīr Al-Jazarī (, vol.1, p.390).

¹⁷⁶Narrated by the trusted narrators with the exception of Al-Bukhārī and ’Ibn Mājah on the authority of ’Ibn ”Umar, c.f. Al-Ḥāfiẓ Al-Zayla”ī (1st edition, (Hadīth), vol.4, p.5).

to allow leaving fruits on the tree. This follows since an unrestricted contract is interpreted based on customary behavior, and it is customary to leave the fruits until they are ripe, as one can infer from the language of the *Hadīth*. Thus, an unrestricted contract is equivalent to one with a condition of leaving the fruits until they are ripe, and both are equally prohibited by the *Hadīth*. The reasoning given by the Prophet (pbuh) regarding the fear of perishing or infection of the fruit may thus be cited to render such sales invalid. More generally, the inference may be made from the *Hadīth* that the status of the sale after the objective is met “until their ripeness is manifested” is treated differently from its status before. Thus, this prohibition applies to sales that are devoid of a leaving condition.¹⁷⁷

In summary, we quote 'Ibn Al-Humām ((Hanafī), vol.5, p.102): “There is no disagreement regarding the **inadmissibility** of: (i) selling fruits before they appear, or (ii) after they appear but prior to manifesting their goodness with the condition of leaving the fruits on the tree. There is also no disagreement regarding the **admissibility** of: (i) selling the fruits before the manifestation of their goodness with a beneficial condition of cutting, or (ii) selling them after their goodness is manifested. The disagreement is only regarding selling them before their goodness is manifested.”

'Ibn 'Abidīn in his *Risāla* preferred following customary practice in making it permissible to sell fruits unconditionally before or after their goodness is manifested, whichever is accepted in common practice. His proof is that a defective condition becomes valid if it is accepted in customary behavior, thus rendering the contract valid based on juristic approbation ('*istihsān*).

Manifestation of goodness or brightness is defined by the majority of jurists as: redness or yellowness for dates; the appearance of sweet nectar; softness; and yellowness in grapes. For other fruits, ripeness is determined based on whichever color the ripe fruit takes (e.g. redness, blackness, or yellowness for dates, grapes, and apricots). In fruits that do not change colors, the test is having a sweet nectar and softness. For grains and plants, the measure of ripeness is their strength.¹⁷⁸ The proof for this demarcation of ripeness is the *Hadīth* that the Prophet (pbuh) “prohibited the sale of fruits until they are ripe”.¹⁷⁹ He also prohibited the sale of fruits until they are bright, which was explained as turning yellow or red.¹⁸⁰ He (pbuh) also prohibited the sale of grapes until they turn black.¹⁸¹ The Hanafīs explained “the manifestation of

¹⁷⁷ Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.4, p.218), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.148), 'Ibn Juzayy ((Mālikī), p.261), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.3, p.86,89), 'Ibn Qudāmah (, vol.4, p.180 onwards), Marṣī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.69).

¹⁷⁸ Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.4, p.217), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.150), 'Ibn Juzayy ((Mālikī), p.261), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.11, p.351,360), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.91), 'Ibn Qudāmah (, vol.4, p.87,89), Marṣī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.70).

¹⁷⁹ Narrated by Al-Bukhārī, Muslim, 'Abū Dāwūd, and Al-Nasā'ī on the authority of Jābir (mAbpwh).

¹⁸⁰ Narrated by Al-Bukhārī, Muslim, Mālik, and Al-Nasā'ī on the authority of 'Anas.

¹⁸¹ Narrated by 'Aṣḥāb Al-Sunan except Al-Nasā'ī, on the authority of 'Anas, c.f. 'Ibn Al-'Athīr Al-Jazārī (, vol.1, p.390 onwards), Al-Shawkānī (, vol.5, p.173).

goodness” as “safety from the incidence of an infection or defect”. Thus, the Ḥanafīs have considered only the appearance of the fruit, while the majority of jurists considered the appearance of ripeness and sweetness in fruits and strength for grains and plants.

The Ḥanafīs required inspecting the “appearance of goodness” separately for each type of fruit. The Shāfi‘īs and most Ḥanbalīs required the inspection of goodness of each type of fruit separately even if they are grown in one orchard. Thus, it is not sufficient to observe the manifestation of ripeness of the grapes grown in some orchard to validate the sale of pomegranate grown in the same orchard. It is also not valid to sell grapes from one orchard based on the manifested ripeness of grapes in another orchard. In all these cases, the ripeness of one type or in one geographical location does not imply ripeness in another.

The Mālikīs, however, ruled that if the goodness of one type of fruits is manifested, it is valid to sell the fruits [of the same type] grown in neighboring orchards. It is not valid, however, to sell one type of fruit based on the appearance of goodness of another type.

The Zāhirīs ruled that the manifestation of goodness of one type of fruits in an orchard validates the sale of all other types of fruits grown in that orchard as long as the sale of all those fruits is in one contract. The exceptions from this rule are dates and grapes, the sale of which requires brightness of color or appearance of ripeness through blackness, etc. This exception is made due to the existence of an explicit *Hadīth* dealing with those specific fruits.¹⁸²

Sale of fruits, cucumbers, and watermelon

This section deals with the sale of fruits or plants some of which were manifested to be good, and it is likely that new produce will follow and be mixed with the old. Examples include figs, cucumbers, bananas, roses, watermelon, eggplant, zucchini, and pumpkins. In such cases, the most common Ḥanafi opinion, also supported by the Shāfi‘īs, Ḥanbalīs, Zāhirīs, Zaydīs and ’Ibādīs is that it is permissible to sell that which has appeared in the beginning. However, the sale of that which has appeared, together with that which has not, is not permissible. In the latter case, the contract would include known and unknown objects of sale, where Allāh may prevent the unknown from ever appearing. The invalidity of this sale also follows from the undeliverability of the object of sale. The need to sell those fruits and vegetables can be met by selling the entire plant. In this case, a distinction is made between selling un-ripened fruits, which is permissible, and selling those that have not yet been created, which is not.

For the impermissible sales discussed in this section, the Ḥanafīs rendered the sales defective, while the other schools considered them invalid.¹⁸³ Another

¹⁸²Ibid, ’Ibn Ḥazm (, vol.8, p.530 onwards).

¹⁸³Al-Ķasānī ((Hanafi), vol.5, p.173), Al-’Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.11, p.359), Al-Khaṭīb Al-Shirbī ((Shāfi‘ī), vol.2, p.92), ’Ibn Qudāmah (, vol.4, p.90), Marī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.68), ’Ibn Al-Murtadā (1st edition (Shī‘ah Zaydiyyah), vol.3, p.317), *Sharḥ Al-Nayl* (vol.4, p.72 onwards), *Hāshiyat Al-Shalabī ̄ alā Al-Zayla‘ī* (vol.4, p.12), ’Ibn Hazm (, vol.8, p.471), ’Ibn ̄Ābidīn ((Hanafi), vol.4, p.40), *Al-Rasā’il* of ’Ibn ̄Ābidīn (vol.2, p.139). ’Ibn ̄Ābidīn ((Hanafi), vol.4, p.40) said: “It is clear that this type

opinion in the Ḥanafī school rendered such sales permissible, based on the common practice of selling fruits in this manner. In this regard, forcing people to stop acting according to custom leads to unnecessary hardship. 'Ibn 'Ābidīn has preferred this opinion, and it was adopted in the *Majallat Al-'Ahkām Al-Shāfi'iyya*.

The ruling of the Mālikīs, 'Ibn Taymiya, 'Ibn Al-Qayyim, the 'Imāmī Shī'ā, and according to the most common opinion among later Ḥanafīs is that the sale is valid. This ruling is based on assuming the best regarding Allāh (swt) and the forgiveness of man for the portion of the price corresponding to the fruits that Allāh (swt) allows to grow. The permission is also based on the customary use of this means of sale, whereby the difficulty of discriminating between the fruits leads to combining that whose goodness or ripeness is manifested with that for which it is not.¹⁸⁴ I accept this opinion since it agrees with the requirements of practical life, and the customary usage of this sale. Indeed, if this type of sale is not permitted, there will be endless disputes among the people.

Sale of wheat in its spikes

The Ḥanafīs ruled that it is valid to sell wheat in its spikes, beans in their shells, as well as rice and sesame. Their ruling is based on the *Hadīth* that the Prophet (pbuh) “prohibited the sale of palms until they are ripe, wheat spikes until they turn white, and are safe from infection; he prohibited both the seller and the buyer”. Since wheat is a grain of positive benefit, it may be sold in its spikes like barley.¹⁸⁵

The Mālikīs, Ḥanbalīs and Zāhirīs also allowed the sale of grains in their spikes, but agree among themselves that it is not permissible to sell the grains without their spikes, since their characteristics and amounts are not known. Their proof is the *Hadīth* cited above. Logically, if the grains are strong, their goodness is manifested, which makes them equivalent in status to fruits whose goodness is manifested. If some of the grains are strong, it is valid to sell the entire crop of the same kind grown in the same field. This is in analogy to a tree on which some of the fruits are evidently good.¹⁸⁶

of sale is necessary in our time, especially in Damascus, where there are numerous trees and fruits. Separating people from their customs leads to hardship, and if we make this sale invalid the ruling would make it obligatory to prohibit the eating of fruits in such countries since they are only sold this way. The Prophet (pbuh) has permitted the *salam* sale to meet a need, despite its being based on the sale of a non-existent object. Since the need is apparent here as well, we can make an inference based on the permission of *salam*. Thus, this sale does not contradict the text, and may be approved based on juristic approbation, since the ruling by analogy is that it is not permissible. The apparent ruling in *Al-Fath* is leaning towards permitting it, thus I included the narration on Muhammad. Moreover, we have cited above the narration by Al-Halawānī on the authority of 'Abū Yūsuf and Muhammad. There is no hardship for which the religion does not find a solution, and it is clear that this is the reason for averting the apparent ruling based on the *Hadīth*.

¹⁸⁴'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.156), *Bulghat Al-Sālik* (vol.2, p.79), Al-Bājī Al-Andalusī (1st edition (Mālikī), vol.4, p.219), 'Ibn Juzayy ((Mālikī), p.261), Al-Hillī ((Shī'ah 'Imāmiyyah), p.154), 'Ibn Qayyim Al-Jawziyyah ((Hanbalī), vol.2, p.12).

¹⁸⁵'Ibn Al-Humām ((Hanafī), vol.5, p.106).

¹⁸⁶Al-Bājī Al-Andalusī (1st edition (Mālikī), vol.4, p.220), 'Ibn Rushd Al-Hafid ((Mālikī),

The best supported Shāfi‘ī opinion is that any grains of which the seeds are not seen (e.g. wheat, lentils, and sesame in their spikes) are not valid to sell with or without their spikes, even if they are observed to be strong. In both cases, the warranted object of sale is hidden inside that which is not part of its goodness. Thus, its sale is rendered invalid based on analogy to the sale of wheat buried in the chaff after threshing, which is definitely invalid based on *gharar*. As for the *Hadith* that “the Prophet (pbuh) prohibited the sale of spikes until they are white”, i.e. strong, it is judged to apply to barley and similar grains. Rice and corn, whose grains are visible on their ears, are like barley; whereas those that are hidden in their perianth are like wheat.¹⁸⁷

4.4 Status of defective sales

This section covers the legal status of defective sales, and the ensuing discussion on dealing with the object of sale. The buyer’s voiding of a defective sale, and the increase in an object of a defective sale will also be discussed.

The Ḥanafis have a number of rulings regarding defective sales.¹⁸⁸ One of those rulings is that the defective sale is concluded in exchange for the value of the object of sale or its equal, rather than the named price. Thus, receipt of the object of sale results in ownership. The naming of a defective price (e.g. wine), the inclusion of a defective condition, or ignorance regarding the price, etc. are proof that the intention of the parties to the contract is to conduct a sale. Thus, the sale is concluded with the compensation for the object of sale being its value. This follows since the original objective of the sale is the value of its object. Thus, the object of a defective sale is considered a liability on the buyer, for which he must pay the seller a similar object if it is a fungible, or its value if it is non-fungible.

The proof of the conclusion of a defective sale, and the ensuing exchange of ownership, is that a cornerstone of sales – which is “the exchange of properties” – has been fulfilled by eligible parties in a valid object of sale and price. Thus, the contract must be judged as concluded. Indeed, prohibition in this case does not pertain to the contract itself, but rather to an ancillary attribute of the transaction (e.g. as in conducting an otherwise valid sale at the time of *jum‘a* prayers). The inclusion of such defective conditions is not valid, and therefore their utterance is equivalent to their non-utterance.

Notice that ownership was not established prior to receipt in avoidance of establishing defectiveness of the contract. In this regard, if ownership is deemed to be established prior to receipt, delivery of the price and object of sale would be binding, which establishes the defective contract. This is not permissible, since elimination of defectiveness is a legal requirement.

vol.2, p.151), *Hāshiyat Al-Dusūqī* (vol.3, p.16), ’Ibn Qudāmah (, vol.4, p.83), ’Ibn Ḥazm (, vol.8, p.395).

¹⁸⁷Al-Khatīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.90), Al-’Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.9, p.338 onwards).

¹⁸⁸Al-Sarakhsī (1st edition (Hanafi), vol.13, p.23), Al-Kāsānī ((Hanafi), vol.5, p.304), ’Ibn Al-Humām ((Hanafi), vol.5, p.227 onwards), *Majma‘ Al-Damānāt* (p.216).

The majority of jurists ruled that a defective sale is not concluded, and does not result in ownership, even if the object of sale is received by the buyer. They base their ruling on the maxim that ownership may not result from a forbidden transaction. In this regard, the prohibition of a defective sale renders it illegal, and no legal result (e.g. transfer of ownership) may ensue from an illegal contract.

The Hanafis stipulate two conditions for a defective sale to result in ownership:

1. Receipt of the object of sale and/or price: Thus ownership is not established prior to receipt, since the contract at that time should be voided to remove the defectiveness.
2. That receipt of the object of sale occur with the seller's permission: Thus, ownership is not established if the seller explicitly forbade the buyer from taking the object, or if it were received in his absence without permission.

If the seller neither prohibited the buyer from receiving the object of sale, nor gave him permission, and the buyer received the object during the contract session in the presence of the seller, then:

- The most common Hanafi opinion is that ownership is not established.
- Muḥammad in *Al-Ziyādāt* ruled that ownership is established in this case.
- Al-Mirghīnānī ruled that Muḥammad's opinion is the correct one, since there is a proof that the seller has given an implicit permission to the buyer to receive the object of sale. The status of this receipt is similar to that of a gift-recipient taking the gift in the presence of the donor who does not forbid him from taking it. In both cases, the receipt is valid. In this regard, any sale is an authorization for the buyer to receive the object of sale, thus receiving it in the presence of the seller is tantamount to a prior authorization.
- A well known opinion by the author of *Al-Īdāh* is that there is no authorization for receipt in a defective contract. In this case, receipt of the object of sale is an establishment of defectiveness, which is a legal obstacle for receipt. This distinguishes a defective sale from a gift, where there is no legal impediment to receipt. Thus, in the case of a defective sale, it is not possible to infer the seller's implicit permission by means of a legal proof.¹⁸⁹

4.4.1 Dispossession of an object purchased through a defective sale

One of the rulings regarding a defective sale is that the buyer who is in receipt of the object of sale has all the privileges to conduct transactions that transfer

¹⁸⁹ Al-Kāsānī ((Hanafi), vol.5, p.304), 'Ibn Al-Humām ((Hanafi), vol.5, p.230).

ownership of the item. Thus, all such transactions are executable, including sales, gift giving, charity, pawning, and rental. Such dealings are deemed permissible and executable since they remove the right to benefit from an illegal item. However, the Ḥanafis find all such transactions reprehensible (*makrūh*) since the best legal solution is to void the defective contract. Since the above listed dealings would prevent or delay the legal right to void the contract, they are rendered reprehensible.

Dealings that involve benefiting from the item, such as eating food, wearing clothes, riding an animal, or residing in a house, are not permissible for the buyer in a defective sale. This follows from the rule that ownership that is established through a defective sale is corrupted ownership (*milk khabīth*). Corrupted ownership does not legitimize deriving benefit from the item thus owned, since it should be legally invalidated. This is the most correct opinion among the Ḥanafis.¹⁹⁰

4.4.2 Invalidating the right to void

1. Dispossession of an item purchased in a defective sale:

It is well known that the ownership established through a defective sale is not binding, and is best to void. Each party to the contract has the right to void it unilaterally prior to receipt, regardless of the origin of defectiveness. Moreover, they each have the right to void it after receipt if the defectiveness originates in the compensation, e.g. if the price is wine or pork.

'Abū Ḥanīfa and 'Abū Yūsuf ruled that each of the parties has the right to void the contract if the defectiveness is not inherent to the compensation, but involves a condition of extra benefit or deferment to an unknown time. They thus ruled that the contract is not binding by itself. On the other hand, Muḥammad ruled that only the person for whom the extra benefit would accrue has the right to void the contract. His proof is that the person who derives extra benefit from the condition can validate the contract by removing its defective attribute.¹⁹¹

The above mentioned rulings pertain to the defective transaction itself. One may ask whether the right to void the contract is invalidated by subsequent transactions of the buyer following the defective sale. We need to consider this case in some detail:¹⁹²

1. If the subsequent transaction removes all ownership rights (e.g. sale, gift giving, or freeing of slaves), then the right to void the original defective sale is invalidated. The buyer in the new transaction is liable for the value or a similar object if the object is non-fungible or fungible, respectively. The original buyer thus conducted a transaction with an object that is owned by him, and thus the transaction is executed.

¹⁹⁰ Ibn Al-Humām ((Hanafi), vol.1, p.232), Al-Kāsānī ((Hanafi), vol.5, p.304).

¹⁹¹ Al-Kāsānī ((Hanafi), vol.5, p.300), Ibn Al-Humām ((Hanafi), p.231).

¹⁹² Al-Kāsānī ((Hanafi), vol.5, p.301 onwards).

2. If the subsequent transaction removes ownership rights only partially, or if it doesn't remove ownership rights, then:
 - (a) If the subsequent transaction cannot be voided, e.g. stipulating the freedom of a slave after the owner's death, either (i) directly, (ii) by having children with her, or (iii) by agreement that the slave is freed if he or she pays a certain amount of money, then the right of the original seller to void the original contract is invalidated.
 - (b) If the subsequent transaction can be voided, e.g. rental or leasing, then the initial sale may be voided. In this case, the original seller has the right to void the subsequent rental, and then void the original sale based on its defectiveness. In this case, even though the rental agreement is binding, it may be voided for a reason, and there is no reason better than the removal of defectiveness.
 - If the original buyer in a defective sale writes the object of that sale into his will, the will is valid, but may be voided during the testator's life. This ruling follows since the will is not binding during the testator's life.
 - If the testator dies prior to voiding of the original defective sale, then the right to void that original sale is dropped. In this case, ownership is transferred to the heir, in the same manner it would have been transferred through a subsequent sale.
 - Note that the right to void is inherited. Thus, if the original buyer in a defective sale dies and is inherited by his heirs, the original seller and the original buyer's heirs have the right to void the original sale. In this case, the heirs take the place of the dead person in his right to void that contract. Similarly, the heirs of the original seller have the right upon his death to demand the return of the object of the defective sale.

2. Increase in the object of a defective sale

If the object of a defective sale increases, this increase may be separable or inseparable:

1. An inseparable increase may or may not be generated from the original object:
 - (a) If it is generated from the original object such as the growth of fat, or increase in beauty, then the defective sale may be voided. Such increases continue to pertain to the original object of the sale. Since the original buyer has a liability to return the original object in case the seller voids the contract, all appertainings to that object must also be returned. This argument is based on analogy to the case of returning a usurped object.

- (b) If the increase is not generated from the original object, e.g. by mixing flour with ghee or honey, then the original sale may not be voided. In this case, if the initial seller is allowed to void the contract, he can demand the return of the original object alone, or both the original object with the increase. The first demand cannot be met due to the difficulty of separating the object from the increase. The second is not a valid demand since the increase is not part of the object of sale, originally or by extension, and thus may not be included in the voiding.
2. A separable increase also may or may not be generated from the original object:
- (a) If it is generated from the original object, e.g. newborns, milk, and fruits, then the right to void is in effect. The original seller may thus recover the original object together with the increase that pertains to it. In this case, the original buyer is liable to return the original object to the seller, and this liability extends to the increase that is generated from that object. Again, the analogy is made in this case to the return of usurped objects. We note that indemnity ('*arsh*)¹⁹³ belongs to this category, since it is a compensation for a part that is lost from the original object. This loss is similar to excluding that which is generated by the original object.
 - (b) If it is not generated from the original object, e.g. a gift, charity, or income, the right to return or recover the object is still valid. Thus, the seller has the right to recover the original object with the increase, since the latter occurred on his property. However, it is not good for him since it did not take place while he was liable for the original object. Rather, the increase took place while the buyer was liable for the original object.
 - In summary: The only increase that invalidates the right to void the defective sale is an inseparable increase that is not generated from the original object. In this case, the buyer is not liable for the increase if it perishes, but he is liable for it if he consumes it.
 - Increase due to the buyer's work invalidates the right to void the contract. Again, analogy to a usurped object that is transformed by the usurper's labor is made. Thus, if the buyer in a defective sale buys cotton and spins it, buys thread and weaves it, buys wheat and mills it, buys sesame or grapes and squeezes it, buys land and builds on it, or buys a lamb and cooks it, then the right to void is dropped. The analogy between the receipt of the object of a defective sale and the usurped object is thus: both are a liability on their possessor if they remain in the same state, and their value or equal are a liability

¹⁹³In Arabic, the word “*'arsh*” refers to financial compensation for damage to items other than life and body organs. Compensation for life and body organs is called “*diyah*”.

if they perish. Thus, everything that invalidates the ownership of the usurper invalidates it for the buyer in a defective sale. In the case of an object that is transformed by the labor of the buyer in a defective sale, the buyer is bound to pay the seller the value of the object of the defective sale.¹⁹⁴

- Thus, the seller in a defective sale does not have the right to force the buyer to demolish a building on the land he sold him. In the opinion of 'Abū Ḥanīfa (mAbpwh), the buyer is liable for the value of the land in this case.
- 'Abū Yūsuf and Muḥammad ruled that the right to void the defective sale is not invalidated in this case, and that the seller has the right to demolish the building or remove plants to recover the land. Again, their ruling is based on analogy to the case of usurped land, where the usurper's building on it does not invalidate the owner's right.
- The proof of 'Abū Ḥanīfa is that building and planting in the land are long-term projects. In this case, the building or planting is seen as taking place under the authorization of the seller, who allowed the object of sale to become owned by the buyer. Moreover, demolishing a building can cause a major loss, and thus should not be allowed, and similarly plants should not be pulled out of the ground. The analogy in this case is made to objects of a valid sale or a gift, in contrast to the case of usurped land, where building would not be done with the authorization of the owner.¹⁹⁵
- If the object of a defective sale is subject to diminution, the seller is not prevented from recovering it, whether the diminution resulted from a natural disaster or the actions of the buyer or the object of sale itself. However, if the object was subject to diminution due to the action of a third party, then the seller has the option of collecting the equivalent value of the lost part from the buyer, and letting the buyer collect from the transgressor; or collecting it directly from the transgressor without approaching the buyer.¹⁹⁶

4.5 Summary of forbidden sales in Islam

There are many sales that are forbidden or prohibited in Islam. The non-Ḥanafī jurists do not distinguish – among the forbidden sales – between the defective and invalid ones, while the Ḥanafī jurists make this distinction. We have covered many of those forbidden sales. I shall cover in this section some of the most important forbidden sales in terms of the reason for their corruption. There are four such reasons:

¹⁹⁴ Al-Ḳāsānī ((Hanafi), vol.5, p.302 onwards), 'Ibn ʻĀbidīn ((Hanafi), vol.4, p.137), *Majma' Al-Damānāt* (p.216).

¹⁹⁵ Ibn Al-Humām ((Hanafi), vol.5, p.302 onwards), 'Ibn ʻĀbidīn ((Hanafi), vol.4, p.137), Al-Ḳāsānī ((Hanafi), vol.5, p.304).

¹⁹⁶ Al-Ḳāsānī ((Hanafi), vol.5, p.303).

1. Flaws due to the ineligibility of a party to the contract.
2. Flaws due to the language of the contract.
3. Flaws due to the object of sale.
4. Flaws due to the inclusion in the contract of a description or condition, or due to a legal prohibition.

4.5.1 Ineligibility of a contracting party

Jurists agreed that sales are valid for every sane person of legal age who engages in a sale of his own free will, as long as he is not restricted in dealing for himself (e.g. due to mental incompetence), or for another (e.g. an indebted person). In what follows, I provide a list of individuals whose sales are not valid:

1. **The sale of an insane person** is not valid by consensus. An insane person is not eligible legally and his status is equivalent to an intoxicated person, or one in a coma.
2. **The sale of a non-discerning young child** is not valid by consensus, except for minor items. The sale of a discerning child is rendered invalid due to ineligibility for the Shāfi‘īs and Ḥanbalīs. However, such a sale is deemed valid (and thus executable) conditional on the permission of his guardian for the Hanafīs and Mālikīs. The proof of the latter schools is that the mental abilities of the child cannot be tested except by giving him the authority to buy and sell, and such a test is necessary based on the verse “test the orphans...” [4:6]. The Ḥanbalīs render valid the sales of a discerning child or a mentally incompetent person with the permission of their guardian.
3. **The trading of a blind person**, if the object of sale is described to him, is deemed valid by the majority of jurists, based on mutual consent. However, the Shāfi‘īs render this sale invalid due to the blind person’s limited ability in determining the quality of the object of sale, thus rendering the object of sale unknown.
4. **The sale of a coerced person** is deemed suspended (non-executable) by the Hanafīs, in analogy to the sale of an uncommissioned agent (*fuḍūlī*). If the coerced person approves the sale after all coercion is removed, then the sale becomes executable. The Mālikīs render the coerced sale non-binding, giving the coerced party the option to void or conclude the contract. The Shāfi‘īs and Ḥanbalīs render the sale invalid due to violation of mutual consent at the inception of the contract.
5. **The sale of an uncommissioned agent** is deemed by the Hanafīs and Mālikīs to be valid but suspended pending permission of the true owner; ruling that an ex post permission is equivalent to a prior permission. The Shāfi‘īs and Ḥanbalīs ruled that this contract is invalid at its inception

due to the prohibition of selling that which is not owned by the seller. The latter ruling is based on the defectiveness of every prohibited action.

6. **The sale of a person under legal supervision due to mental incompetence, sickness, or bankruptcy:** The sales of a spend-thrift person who is not mentally competent are suspended for the Ḥanafī, Mālikī, and the majority of the Ḥambalī jurists. The Shāfi‘īs render such sales invalid due to ineligibility of such a person, whose offer and acceptance are thus disregarded.

The sales of a person who is legally declared bankrupt due to unpaid liabilities to his creditors are rendered suspended by the Ḥanafīs and Mālikīs, and not valid by the Shāfi‘īs and Ḥanbalīs.

The non-Mālikī jurists render charitable contributions of a person on his death bed executable within one third of his estate, and suspended for anything over the third pending permission of the heirs. The Mālikīs ruled that his dealings, even in the third, are not executable, except for immovable properties that are unlikely to change, such as buildings, land, trees, etc.

7. **The sale of a person who needs to sell his property to avoid transgression** is considered defective by the Ḥanafīs and invalid for the Ḥanbalīs.

4.5.2 Sales forbidden based on the contract language

Jurists agree that a sale is validated by: (i) mutual agreement of the parties to the contract, (ii) offer and acceptance corresponding to one another regarding the price, object of sale, etc., and (iii) offer and acceptance must take place in a single – uninterrupted – session. The following sales are not valid:

1. **Physical exchange sales (*bay’ al-mu’atāh*):** This is the type of sale that takes place when the buyer and seller agree on the object of sale and price, and exchange them without a verbal offer or acceptance. The majority of jurists agree that this is a valid sale, since a sale is concluded by any actions that indicate mutual consent to exchange ownership of properties. This indication may be accomplished formally by verbal offer and acceptance, or informally by any actions that are conventionally accepted to indicate consent. The latter case is consistent with the Islamic respect for common conventions as long as they are not in conflict with an explicit legal text.¹⁹⁷

On the other hand, the Shāfi‘īs consider this type of sale not concluded. They require verbal offers and acceptances in each contract, be it a sale, lease, pawning, gift, etc. They require the name of “sale” to be indicated, and consider the physical exchange sale lacking an explicit legal proof of consent to satisfy the verse: “but let there be among you traffic and trade

¹⁹⁷Ibn Al-Humām ((Hanafi), vol.5, p.302 onwards), Ibn ‘Ābidīn ((Hanafi), vol.4, p.137), Al-Kāsānī ((Hanafi), vol.5, p.304).

by mutual good will” [4:29], and the *Hadīth*: “sale is but based on mutual consent”.¹⁹⁸ In this regard, consent is a hidden matter that cannot be observed, and thus the status of the contract must be determined by an observable proof, in this case the language of the contract. Thus, they ruled that the received object of a physical exchange sale has the same status of a received object of a defective sale. This gives each party to the contract the right to demand the return of what he delivered to the other if it remains intact, or its compensation if it perished.

Some Shāfi‘īs, including ‘Ibn Surayj and Al-Rūyānī, allowed physical exchange sales for minor items such as a pound of bread or a small amount of beans. Some of them ruled that the physical exchange sale is sufficient for those who are habitual traders, and for commoners with a trader, but verbal expression is necessary for those who are not commonly trading thus. Al-Nawawī wrote in *Al-Majmū‘*: “but if he takes some objects of sale and pays him at a later time, as many people do, then there is a consensus that the sale is invalid. Such a sale is neither a verbal sale, nor is it a physical exchange sale.” On the other hand, Al-Nawawī validated the physical exchange sale by saying: “the preferred opinion based on legal proof is rendering this sale valid. Since there is no legal obligation to have a verbal exchange, it is necessary to consider conventional usage”.¹⁹⁹

2. **Sales by correspondence or messenger** are agreed upon by jurists as valid contracts. The session during which the message arrives from the first to the second party of the contract is considered the contract session. Thus, if acceptance is uttered after that session, the contract is not concluded.
3. **Sales of mute persons by means of an understood signal or writing** are agreed upon by jurists as valid. Thus, necessity requires equating the actions of the mute person to the verbalization of a speaking person. However, if the mute person’s signals were not understood and his writing is not legible, then the contract is not valid.
4. **Sales with a party who is absent from the contract session** are agreed by jurists to be invalid. This follows since the unity of the contract session is one of the conditions of conclusion of sale.
5. **Sales where the offer and acceptance do not correspond** are agreed upon by jurists as invalid, unless the disagreement is beneficial. For example, if the buyer pays more than the agreed upon price, the Hanafīs render the contract valid, while the Shāfi‘īs render it invalid.
6. **Non-consummated sales (*ghayr munjaz*)**: This category includes sales suspended pending a condition or deferred to a future time. Such sales are considered defective by the Hanafīs and invalid by the other jurists.

¹⁹⁸Validated by ‘Ibn Hibbān.

¹⁹⁹Al-Suyūtī ((Shāfi‘ī), p.89).

4.5.3 Sales forbidden based on the objects of sale

The most general interpretation of “objects of sale” incorporates the properties paid by both parties, one of which is labeled “price” and the other “object of sale”. Jurists agreed that the sale is valid if the objects of sale are properties that are: (i) owned, (ii) valued, (iii) existent, (iv) known to the parties, (v) without any other party sharing in their rights, and (vi) not legally prohibited. There are differences among jurists regarding the forbidden sales as detailed below:

1. **Sale of non-existent objects, or objects that are in danger of ceasing to exist:** This category includes the sales of the sperms of he-camels, the unfertilized eggs of she-camels, and the offspring of the offspring of a pregnant animal. All of those sales are deemed invalid and not concluded by the 'Imāms of all four schools of jurisprudence, based on valid *Hadīths* that prohibit them.
2. **Sale of undeliverable items:** Examples of such sales include birds in the air and fish in the sea. Such sales are deemed invalid and not concluded by all schools of jurisprudence based on a well-documented prohibition in the *Sunnah*.
3. **Deferred sale of debts:** This type of sale (*al-kāli' bilkāli'*) is deemed invalid by all jurists based on its legal prohibition. The immediate resale of a debt to the debtor is agreed to be valid, while the immediate sale of debt to a third party is deemed invalid by the Ḥanafīs, Ḥanbalīs and Ṣāḥirīs and permissible for the other schools of jurisprudence.
4. **Excessive *gharar* sales:** *Gharar* is that whose existence is not certain, and its sale is not valid by consensus based on its prohibition. However, some of those sales are agreed upon as invalid, such as the sale of the sperms and unfertilized eggs of camels and the offspring of the offspring of animals, and some are rendered by the Ḥanafīs to be defective. Examples of the latter category are: the sale of the catch of a diver or hunter, the exchange of fresh dates on palms and grapes on vines with dried dates and raisins at an estimated ratio, the sale of wheat in its spikes in exchange for wheat grains at an estimated ratio, touch-sales, pebble sales, and the sale of an unknown item out of more than three. 'Ibn Juzayy of the Mālikī school said:²⁰⁰ “The prohibited *gharar* can be divided into ten categories:
 - (a) That which is not possible to deliver such as a run-away camel: This category also includes the sale of embryos in the womb without the sale of its mother, and the exclusion of the embryo in a sale of the mother, the sale of the offspring of the offspring of a she-camel, and the sale of the sperm of he-camels.
 - (b) Ignorance of the genus of the price or object of sale: e.g. if the seller says: “I sell you what is in my sleeve”.

²⁰⁰'Ibn Juzayy ((Mālikī), p.256 onwards).

- (c) Ignorance of the characteristics of the price or object of sale: e.g. if the seller says: “I sell you one of the dresses in my house”, or buying an item without inspection or description.
- (d) Ignorance of the quantity or size of the price or object of sale: An example of the former is a seller saying: “I sell you in exchange for today’s price”, or “at the price at which people trade”, or “for whatever price so-and-so states”, all of which are only valid if sold in bulk. An example of the second case is the impermissibility of the sale of wheat inside its spikes due to ignorance. However, it is valid to sell wheat together with its spikes, in disagreement with the position of Al-Shāfi‘ī. Also *impermissible* is the sale of wheat *in* its chaff, while its sale *with* its chaff is *valid*. It is not permissible to sell the dust of jewelers. It is permissible to sell green beans, coconuts and walnuts in their outer shells, also in disagreement with the position of Al-Shāfi‘ī.
- (e) Ignorance of the term of deferment. Examples include a seller saying: “I sold you until Zayd returns” or “until ‘Amr dies”. However, it is valid for the seller to say: “until harvest time”, “until the grains are threshed”, or “until such-and-such month”. In the last case, deferment is understood to be to the middle of the month.
- (f) Two sales in one: This is the case where one object is sold for either of two different prices, or the sale of either of two objects for one price. An example of the first is a seller saying: “I sell you this dress cash and carry for ten, or deferred for twenty”, assuming that the sale is binding for one of them. An example of the second is the seller saying: “I sold you one of these two dresses for so-much”, assuming that one of them is binding.
- (g) The sale of that whose good status is not expected: e.g. a sick horse or camel in a race.
- (h) Pebble sales: This is the sale where one person carries a pebble in his hand, and if it falls the sale is binding.
- (i) Discarding sale: If one person discards his dress to the other, and the other discards his dress to the first, then the sale is binding.
- (j) Touch-sales: This is the sale that is made binding if the potential buyer touches the item (say a dress), even if he never inspected it.

In summary, all of those types of sales involve: (i) the sale of non-deliverable items, (ii) the sale of an unknown, (iii) the sale of probable items, or (iv) the sales of the pebble, discarding, or touch.

5. **Sale of impure or tainted objects:** There is agreement that it is not valid to sell impure objects such as wine, pork, the flesh of dead animals, and blood. The majority of jurists also render as not valid the sale of tainted objects that cannot be purified, such as ghee, oil, or honey in

which an impure object – e.g. a rat – had fallen. The Mālikīs allowed the use of impure or tainted oil for lighting or manufacturing of soap, while the Ḥanafīs allowed the sale of tainted objects for usage other than eating, such as tanning leather, painting, and lighting of places other than mosques. However, they do not allow any usage of the fat of dead animals to avoid this practice of Jews, who – when forbidden the flesh of dead animals – melted the fat of the animals, sold it, and consumed its price. Also not valid in the eyes of the majority of jurists is the sale of musical instruments, since their usage is forbidden. However, the Zāhirīs and some of the Mālikīs allowed their sale, based on authentic *Hadīths* that render the use of drums permissible.

6. **Sale of water:** The majority of jurists from the four major schools permit the sale of owned water that is contained in containers, springs or wells. The Zāhirīs, on the other hand, render the sale of water categorically impermissible. There is a consensus among jurists that it is not valid to sell public water, the rights of which are shared among the people. This is based on the above mentioned *Hadīth* that people are partners in fire, grass, and salt.
7. **Sale of unknown objects:** The Ḥanafīs rendered as defective sales that contain significant ignorance regarding (i) the object of sale, (ii) the price, (iii) the term of deferment, (iv) the type of pawned object, or (v) the guarantor. The majority of jurists render such contracts that contain significant ignorance invalid due to the possibility of causing conflict and dispute.
8. **Sale of absent or unseen objects:** The Ḥanafīs rendered as valid sales with neither inspection nor description of the object of sale, giving the buyer an option at the time of seeing the object. The Mālikīs rendered such sales valid based on description, while maintaining that the buyer has the option after inspecting the object. The Shāfiīs and the majority of the Ḥanbalīs render such sales categorically invalid.

The Mālikīs²⁰¹ stipulated five conditions for sales based on description alone:

- (a) That the item is not too far away, e.g. the distance between Spain and Africa.
- (b) That it is not too near, e.g. present in the same town.
- (c) That the description is given by a person other than the seller.
- (d) That the description covers all relevant aspects of the object.
- (e) That its price is not collected by the seller with a condition, unless the object is unlikely to change, e.g. real estate. Payment of the price is permissible if there are no conditions.

²⁰¹Ibn Juzayy ((Mālikī), p.256).

If the sale is based on both inspection and description, then the sale is binding, but if one is missing, then the buyer has an option.

It is permissible to sell homogeneous clothes based on their label.²⁰² This is in contrast to a folded dress that was not exhibited or inspected.

9. **Sale of un-received items:** This type of sale is impermissible for the Ḥanafīs if the object of sale is movable, based on the prohibition of such sales. However, the sale of immovable objects prior to receiving them is permissible, since it is unlikely that the object will change. The Shāfiʻīs, on the other hand, render this type of sale categorically invalid, based on the general prohibition in the *Hadīth*: “The Prophet (pbuh) has forbidden selling the object where it is bought until the merchants possess it in their caravans”.²⁰³ The Mālikīs restricted this prohibition to foodstuffs, whether or not they were eligible for *Ribā*. The Ḥanbalīs, on the other hand, restricted the prohibition to foodstuffs measured by weight, volume or number, based on the *Hadīth*: “If you purchase any foodstuffs, do not sell them until you receive them in full”.²⁰⁴
10. **Sale of fruits and vegetables:** It is agreed that such sales are invalid if the objects of sale have not yet been created, since they are thus considered non-existent. If the sale is prior to manifestation of goodness with a condition of leaving them, then it is rendered not valid by consensus; being defective for the Ḥanafīs and invalid for the majority. If the sale is concluded with the condition of cutting immediately, then it is rendered by consensus to be valid. On the other hand, if the sale is without any conditions, it is rendered valid by the Ḥanafīs and invalid by the majority of jurists.

If ripeness has been manifested, then the Ḥanafīs ruled that the sale is permissible, based on the decision of Muḥammad ibn Al-Ḥasan, even with a stipulated condition of leaving fruits that had reached maximal size. However, the sale is rendered defective if the objects of sale had not yet reached full size. The majority of jurists, on the other hand, render the sale in this case categorically permissible, even with a condition of leaving.

4.5.4 Sales forbidden based on a description, condition, or legal prohibition

Jurists are in agreement that a sale is valid if all of its cornerstones and conditions are satisfied, provided that it does not have any characteristics that are

²⁰²The label is a piece of paper on the container within which the clothes are hidden. This type of sale results in the sale of an absent object without a description of its type and genus. It is permissible with two conditions: (i) establishment of the buyer's option after viewing the object; and (ii) non-payment of the price to the seller at this time.

²⁰³Narrated by 'Abū Dāwūd and Al-Dāraqutnī on the authority of Zayd ibn Thābit, c.f. Al-Shawkānī (, vol.5, p.157).

²⁰⁴Narrated by 'Aḥmad and Muslim on the authority of Jābir, c.f. ibid.

detrimental to society, contain any conditions that are in conflict with the prerequisites of the contract, etc. Conditions and characteristics that may spoil the validity of a contract are:

1. **Downpayment sale (*bay‘u al-‘urbūn*):** This type of sale is not permissible in the eyes of most jurists since it is forbidden in the *Sunnah*. The Ḥanafīs render this type of sale defective, while the Mālikīs and Shāfi‘īs render it invalid if the seller is not obliged to return the downpayment in case the sale is not concluded. However, if the seller is obliged to return the downpayment in the event the sale is not concluded, they render the downpayment sale permissible. The Ḥanbalīs, on the other hand, render the contract permissible in either case, based on a permission by the Prophet (pbuh). Neither *Hadīth* in this regard has been authenticated.
 2. **Same item resale:** This is the contract discussed above in detail, whereby the two parties to the contract undertake permissible actions to reach a forbidden outcome. Thus, the Mālikīs and Ḥanbalīs render this contract invalid and forbidden, to prevent the means to the forbidden end. The Ḥanafīs render this contract defective if there is no intermediation by a third party, and the Shāfi‘īs and Zāhirīs consider it valid but reprehensible.
- There are three types of same-item re-sales:²⁰⁵
- (a) A man may tell another “buy this item for ten, and I shall buy it back from you for a deferred price of fifteen”. In the opinion of ‘Imām Mālik, this is considered *Ribā*, since his school of thought considers only whatever is spent and received and ignores the intermediate steps. Thus, the above mentioned transaction would be considered equivalent to one man giving the other ten *Dinārs*, and taking in exchange a deferred credit of fifteen *Dinārs*; and the intermediate commodity is deemed legally irrelevant.
 - (b) A man may tell another “buy this item for ten, and I shall buy it back from you for a higher deferred price”, without naming the deferred price. In this case, the Mālikīs would render the contract reprehensible but not forbidden.
 - (c) A man may approach another to buy a commodity, but find that the potential seller does not have it. The potential seller may buy it without the potential buyer’s order, then say: “I have bought the object that you sought from me, and you may buy it if you wish”. In this case, the seller may sell the item cash-and-carry, or for a deferred price, regardless of whether the price is the same, more, or less than what he paid for it.
3. **Ribā:** Both credit *ribā* (*al-nasī’ā*) and surplus *ribā* (*al-fadl*) are considered defective for the Ḥanafīs and invalid for the majority of jurists, based on the established prohibitions in the Qur’ān and *Sunnah*.

²⁰⁵Ibn Juzayy ((Mālikī), p.258).

4. Sales with a forbidden price: If the price in a sale is a forbidden item such as wine or pork, then the Ḥanafīs render the sale defective, but concluded for the value of the object of sale, while the majority of jurists render the sale invalid. This is based on the *Hadīth* narrated in Al-Bukhārī and Muslim that the Prophet (pbuh) prohibited the sale of wine, dead animals, pigs, and idols.

5. Sales by a city dweller on behalf of a bedouin who is unfamiliar with the price levels: Many generalize this category to any sale to a person who is new to a place, and unfamiliar with the market prices in that new place. This generalization is valid in reflecting the true intent of the prohibition of this type of sale. This sale is forbidden in the *Hadīth* of the Prophet (pbuh), narrated by most narrators with the exception of Al-Bukhārī on the authority of Jābir: “A city-dweller should not sell on behalf of a bedouin, leave the people so that Allāh may make them benefit from one another”.²⁰⁶

This prohibition is based on the valuation of the benefit of the many over the benefit of any one individual, by forbidding one individual from meeting the incoming person and preventing other market participants from making a profit by dealing with him. The form of such a sale would be as follows: A stranger would come to the city with a commodity that he wishes to sell immediately at the going market price. A local merchant may then come and tell him: “leave this good with me, and I shall sell it on your behalf over time at a higher price”.

Jurists made this prohibition more specific.²⁰⁷ For instance, the Ḥanafīs ruled that this prohibition is restricted to the times of high prices or inflation, and to commodities that are considered necessities.

The Shāfi‘īs and Ḥanbalīs, on the other hand, generalized it to any incoming trader who is asked by a local to leave the good with him for sale at a higher price. ‘Ibn Hajar said in *Al-Fath*: “Thus, they have made the rule applicable to bedouins and others who share their status. Thus, bedouins were only mentioned since most incomers would be bedouins, but the intent was to include all others who do not know the local prices”. However, the Mālikīs insisted on the restriction only to bedouins. Mālik said: “No other category of people may be added to bedouins in this prohibition, unless they are similar. Thus, farmers who know prices and understand markets are not included in this prohibition.” The Mālikīs render this sale defective and allow its voiding, in the same manner they allow the voiding of *bay‘ al-najash* (price hiking). The Ḥanafīs render it valid, and the Shāfi‘īs and Ḥanbalīs maintain that there is an option in this sale.

6. Meeting caravans outside the city: When caravans bring goods for sale, it is forbidden to meet them outside the market, whether they are on

²⁰⁶ Al-Shawkānī (, vol.5, p.164).

²⁰⁷ Al-Shawkānī (, vol.5, p.164).

foot or riding, many or few. The Hanafīs ruled that it is reprehensible to the point of prohibition based on the *Hadīth*: “Do not meet the caravans outside, and let not a city dweller sell on behalf of a bedouin”.²⁰⁸ The most common interpretation of this *Hadīth* is that the incoming traders are more than one, and riding.

Jurists disagreed with respect to this prohibition and whether or not it results in defectiveness of the sale. While some scholars ruled that it does result in defectiveness, the majority ruled that it does not. The opinion of the latter is based on the extraneous nature of “meeting the caravan”, which does not force the incoming traders to trade with the one who meets them. In this regard, the Prophet (pbuh) said: “The owner of the goods has the option if he comes to market”.²⁰⁹ Ibn Taymiya said in *Muntaqā Al-'Akhbār*: “This *Hadīth* is proof of the validity of the sale”. Thus, the most common opinion is that this sale, as well as that of the city-dweller on behalf of the bedouin, are valid. This is the opinion of the Hanafīs. The Ḥanbalīs and Shāfi'īs stipulated that the “option of injustice” (*khiyār al-ghubn*) is established for this sale. The Mālikīs, on the other hand, forbade it for experienced traders, and rendered it defective.

7. Price hiking (*bay' al-najash*): Al-Shāfi'ī defined this behavior thus: “*bay' al-najash* is the sale wherein a person bids-up the price of a commodity with no intention of buying it, only to induce others to buy it for more than they would have otherwise”. Thus, jurists condemned the behavior of both the seller (who is part of the conspiracy) as well as the potential buyer who “drums-up” the goods, and the latter was labeled a sinner.

There is disagreement among jurists regarding the legal status of this sale. The Zāhirīs ruled that it is defective, while the majority of the Mālikīs and Ḥanbalīs ruled that it is valid, but established an option for the buyer if the inequity is excessive. The Hanafīs and the majority of the Shāfi'īs ruled that it is a valid but sinful sale. Thus, it is considered reprehensible to the point of prohibition for the Hanafīs and forbidden for the Shāfi'īs. However, the Hanafīs did not find the *najash* sale reprehensible unless the ultimate sale price exceeds the true value of the sold item. If the price is raised through the *najash* sale while remaining below the value of the sold item, it is not deemed reprehensible since the net result is closer to justice. It is important not to confuse this type of sale with public auctions, which are permissible as detailed below.

8. Auctions: The Prophet (pbuh) was reported to have engaged in auction sales. It is narrated by 'Ahmad and Al-Tirmidhī on the authority of 'Anas that: “The Prophet (pbuh) sold a cup and a mini-rug by auction”. Al-Bukhārī narrated on the authority of 'Atā' that he said: “I wit-

²⁰⁸Narrated by Al-Bukhārī and Muslim on the authority of 'Ibn 'Abbās.

²⁰⁹Narrated by the major narrators with the exception of Al-Bukhārī on the authority of Abu Hurayra.

nessed people (companions of the Prophet (pbuh)) finding nothing wrong with selling spoils of war by auction".²¹⁰ 'Ibn 'Abī Shayba and Sa'īd ibn Mansūr narrated that Mujāhid said: "There is no harm in selling by auction. This was the customary manner in which one fifths of the spoils of war were sold." Al-Tirmidhī, commenting on the above mentioned narration on the authority of 'Anas, said: "For some scholars, the inference from this *Hadīth* is that there is no harm in selling spoils of war and inheritance by auction". 'Ibn Al-'Arabī, on the other hand, said: "There is no reason for restricting the permissibility of auctioning to spoils of war and inheritance. The general topic is one, and its interpretation applies more generally".

The most correct opinion is the unconditional permissibility of sales by auction. The proof of this opinion is that the cup and mini-rug mentioned in the *Hadīth* of 'Anas were neither spoils of war nor inheritance. Thus, their mention should be interpreted to imply permissibility for all other items that they customarily sold by auction.²¹¹

Auction sales as described here are conducted as follows: the seller exhibits the object of sale to the public, and they bid for it until the person with the highest (last) bid buys it.²¹²

It is reported that 'Ibrāhīm Al-Nakhī disliked auction sales, based on an authentic *Hadīth* of Jābir that the Prophet (pbuh) asked regarding an item:²¹³ "Who buys this from me?" Then Na'im ibn 'Abd Allāh bought it for eight hundred *Dirhams*. Al-'Ismā'i'lī said in rebuttal to 'Ibrāhīm Al-Nakhī's opinion: "There is no mention in this story of an auction sale; an auction would require one person bidding one price, and another bidding a higher price". In this regard, the *Hadīth* of 'Anas was narrated by 'Abū Dāwūd and 'Alīmad thus: "The Prophet (pbuh) offered to sell a cup and a mini-rug to some of his companions. One of them said: I bid one *Dirham*, and another said: I bid two *Dirhams*".

9. **Sales during the call for *Jum'a* prayers:** This period is specified as the time between the 'Imām's ascent on the *minbar*, and the end of the prayer. However, the Ḥanafīs extended this period to begin at the time of the first call for prayers ('*athān*). Sales during this period are considered: (i) reprehensible to the point of prohibition for the Ḥanafīs; (ii) valid but forbidden for the Shāfi'īs; (iii) void for the majority of the Mālikīs; and (iv) invalid at inception for the Ḥanbalīs.
10. **Sale of grapes to a wine-maker:** This sale is valid in its form, but considered reprehensible to the point of prohibition for the Ḥanafīs, and forbidden for the Shāfi'īs. It is valid due to the satisfaction of the cornerstones and legal conditions of sale, but sinful due to the corrupt intention

²¹⁰Ibn 'Abī Shayba narrated the same on the authority of 'Atā' and Mujāhid.

²¹¹Al-Shawkānī (, vol.5, p.169).

²¹²tr: That is an open-outcry first-price auction.

²¹³tr: The item mentioned in this *Hadīth* is *al-'abd al-mudabbar*.

of the parties to the contract. Of equal status is the sale of a sword to one who kills another unjustly, the sale of a hunting net to one who hunts in holy places, or the sale of wood to one who uses it to construct instruments of entertainment.

The Mālikīs and Ḥanbalīs, on the other hand, render such sales invalid to prevent the means to illegal ends (*saddan li-l-dharā’i*). Their ruling on those sales is the same as their counterparts for the sale of weapons during a civil war or to pirates, and the sale-resale contracts used as a means of effecting *ribā*. In this respect, their rulings are based on the maxim that any means that lead to forbidden ends are equally forbidden, even if the judgment has to be made based on intentions.

11. **Sale of a woman without her young child, or a young child without his mother:** Such sales are not permissible until the young child is not in need of his or her mother. This prohibition is due to the separation of the two, where the Prophet (pbuh) has forbidden such separation by saying: “Whosoever separates a mother from her child, Allāh will separate him from his beloved ones on the day of judgment”.²¹⁴ However, the Mālikīs permitted separation between the father and the child, despite the prohibition of that as well in the *Hadīth*: “The Messenger of Allāh has cursed whosoever separates a man from his child, or a brother from his brother”.²¹⁵ If this *Hadīth* is valid, it is certainly wise to act accordingly.

The sale of a mother without her young child is considered defective and un-concluded for the majority of jurists. However, ’Abū Ḥanīfa ruled that the sale is concluded.

12. **Replacing the sale of another:** The form of this sale is thus: An original sale takes place, containing an option period. During the option period, a third party approaches the buyer and urges him to void the first sale, with a promise to sell him a similar item at a lower price or a better item at the same price. This is called a sale to replace a sale (*bay’un ‘alā bay’*). Its mirror image is a purchase to replace a purchase (*shirā’un ‘alā shirā’*), where a third party urges the seller during the option period to void the sale on a promise that he will buy it for more. Bargaining to replace bargaining (*al-sawmu ‘alā al-sawm*) is a closely related notion, where a third party intervenes after the seller and a potential buyer agreed on the price but before they conclude the sale. The third party in this type of intervention would say: “I shall buy it from you for more”.

Jurists reached a consensus that all such behaviors are forbidden, and the one who perpetrates them is a sinner.²¹⁶ This ruling is based on the

²¹⁴Narrated by ’Ahmad and Al-Tirmidhī on the authority of ’Abū ’Ayyūb. However, his chain of narration includes disputable sources, c.f. Al-Shawkānī (, vol.5, p.161).

²¹⁵Narrated by ’Ibn Mājah and Al-Daraquṭnī on the authority of ’Abū Mūsā (ibid), with an acceptable chain of narrators.

²¹⁶Al-Ṣan‘ānī (2nd printing, vol.3, p.23).

Hadīth: “Let none of you supplant the purchase of his brother”.²¹⁷ The original *Hadīth* refers to the case of liability, but the majority of scholars have agreed that its applicability is general, covering even the trading of non-Muslims.

Jurists differed, however, over the legal status of the mentioned sale. The Ḥanafīs and Ṣḥāfiṣis rendered it valid but sinful, while the Ḥanbalīs, ‘Ibn Hazm, and some of the Mālikīs rendered it defective. However, the most common opinion for the Mālikīs and others with the exception of ‘Ibn Hazm is that the prohibition applies after the gap between the negotiators had narrowed down sufficiently.²¹⁸ This opinion is based on the fact that bargaining in an auction sale is agreed upon as permissible, following the narration by ‘Ibn Hajar on the authority of ‘Ibn ‘Abd Al-Barr. Thus, the forbidden action is the initiation of new bargaining after the original parties have almost reached an agreement.

13. **A sale with a condition:** This is the contract labeled *bay‘u al-thunyā* by jurists, and they have disagreed over its legal status:

- The Ḥanafīs ruled that a sale with a defective condition is rendered defective. Defective conditions are ones that are not essential or in accordance with the prerequisites of the contract, and that were not accepted in a legal text or accepted as conventional practice. This limits attention to conditions that result in a benefit to one of the parties, e.g. where the buyer purchases a cloth on condition that the seller sews it into a shirt. As for invalid conditions, they are ignored and the base contract is rendered valid. Invalid conditions in this case are ones that result in a harm to one of the parties, e.g. if a person sells an item to another on condition that the other may not sell or pawn it.
- The Mālikīs ruled that a sale with a condition is rendered invalid if the condition restricts the buyers ability to deal in the purchased item privately or publicly. Thus, they disagree with the Ḥanafī scholars over the status of an invalid condition. However, they permit a sale with a condition if the buyer is stipulating a condition that is of benefit to himself, again in contrast to the Ḥanafī position on defective conditions. Finally, they permit the sale and invalidate the condition if the latter renders the price flawed. An example of such corrupting conditions is the seller stipulating: “if you do not deliver the price within three days, then there is no sale between us”, where the sale is valid, but the condition is voided. However, if the seller says: “whenever I return the price to you, you must return the object of sale to me”, then the contract is invalid. The latter is known in Ḥanafī jurisprudence as a redemptive sale (*bay‘u al-wafā’*).

²¹⁷Narrated by ’Aḥmad on the authority of ‘Ibn ‘Umar, c.f. Al-Ṣḥawķānī (, vol.5, p.167 onwards).

²¹⁸Ibn Juzayy ((Mālikī), p.259), Al-Ṣḥawķānī (, vol.5, p.169).

- The Shāfi‘īs ruled that a sale with a condition is valid if the condition involves a benefit to one of the contracting parties, as in the case of options, deferment, pawning, and guaranty. However, the contract is deemed invalid if the condition is in conflict with the prerequisites of sale, such as conditions that the buyer may not sell the object of sale, or give it as a gift. In this regard, their opinion is in agreement with the Mālikīs.
- The Hanbalīs ruled that a sale with one condition that results in a benefit to one of the contracting parties is valid, while a sale with two conditions is invalid. They base their ruling on the *Hadīth*: The Prophet (pbuh) said: “The following are not permissible: a loan and a sale, two conditions in one sale, and the sale of that which is not in your possession”.²¹⁹

Based on the latter mentioned *Hadīth*, there is a consensus among the jurists that a sale with a condition of borrowing from one of the parties of the contract is not permissible. The Mālikīs, however, distinguish the case where the one stipulating the condition does not insist on it, and render the sale permissible if he drops that condition.

- 14. Combining a sale and one of six contracts in one agreement:** The six contracts are *al-ji‘āla* (promise or reward), currency exchange, sharecropping, partnership, marriage, and silent partnership. Combining a sale with any one of those contracts in one agreement is rendered defective and forbidden for the majority of the Mālikīs. However, ‘Ashhab permitted such combinations, and ‘Ibn Juzayy reported that this was in agreement with the opinions of Al-Shāfi‘ī and ‘Abū Ḥanīfa.²²⁰ The Mālikīs permitted the combination of a sale and a lease, and two sales in one sale, always interpreting the second as an imbedded option. The majority of jurists, on the other hand, have forbidden the latter combinations, rendering them defective for the Hanafīs, and invalid for the Shāfi‘īs and Hanbalīs.

Defective or invalid sales for the Mālikīs

There are five aspects in which defectiveness or invalidity of a sale may be considered:²²¹ (i) what pertains to the parties of the contract; (ii) what pertains to the price and the priced object (the first two items belong to discussions of the cornerstones of a contract); (iii) what pertains to *gharar*; (iv) what pertains to *ribā*; and (v) the various types of sale that are explicitly forbidden. The last category consists of ten forbidden sales contracts:

1. The sale of foodstuffs prior to receiving them.
2. Same item sale-resale (*bay‘ al-‘inah*).

²¹⁹Narrated by ‘Abū Dāwūd and Al-Tirmidhī on the authority of ‘Abd Allāh ibn ‘Amr.

²²⁰‘Ibn Juzayy ((Mālikī), p.360).

²²¹‘Ibn Juzayy ((Mālikī), pp.257-260), ‘Ibn Rushd Al-Hafid ((Mālikī), vol.2, pp.125, 146 onwards, 158-168).

3. Downpayment sale (*bay^c al-^curbūn*).
4. Sales by a city-dweller on behalf of a bedouin.
5. Meeting the caravan to receive their goods a mile or more outside the city.
6. Intervening to replace a party in a sale after the seller was close to an agreement with the initial buyer. This type of sale is valid but sinful for the majority of jurists, but defective for the Hanbalīs. Its denunciation is based on its prohibition, and due to its invitation of harm and dispute between the potential buyers.
7. Sales during the Friday prayers.
8. The sale of a mother without her young child, or the sale of the young child without its mother.
9. A sale and a condition in one contract (*bay^c al-thunyā*).
10. Combining a sale and one of six contracts (*jīcālah*, currency exchange, *musāqāh*, partnership, marriage, and silent partnership) in one agreement (*safqa*).

Invalid sales for the Shāfi‘īs

There are numerous invalid sales in the Shāfi‘ī school’s thought, among which the following thirty-one are the most important:²²²

1. The sale of un-received items, except in: (i) inheritance, (ii) items specified in a will, (ii) an amount less or equal to a person’s entitlement at the Islamic treasury (*bayt al-māl*), (iii) spoils of war, (iv) trusts, (v) returned gifts, (vi) hunted animals captured in a net, etc., (vii) the object of an Islamic forward sale (*salam*), (viii) monies invested in a partnership or silent partnership, or (ix) a pawned object after the pawning is ended.
2. The sale of objects that are not immediately deliverable, such as birds in the sky. There are six exceptions to this rule: (i) leased objects, (ii) objects of Islamic forward sales (*salam*), (iii) a large quantity of grains that cannot be measured in a short time period, (iv) a usurped object or (v) a run-away slave being sold to a person who can collect the object of sale, or (vi) a non-fungible object, moveable or immovable, which is in another country, etc. In those six exceptional cases, the sale is valid even if the object of sale is not immediately deliverable, since the buyer still achieves his objective from the sale.

²²² *Tuhfat Al-Tullāb* by Sheikh Zakariyyā Al-Anṣārī (pp.152-158), Al-Sharqāwī ((Shāfi‘ī), vol.2, pp.50-64)

3. The sale of the offspring of the offspring of an animal: In this invalid sale, a seller would say: “If this she-camel gives birth to a she-camel, and then the born she-camel gives birth to another camel, I have sold you the offspring of the second”. Another form of this invalid sale is the purchase with a price deferred to the birth of the offspring of a specific she-camel and the object of sale being the offspring of the offspring.
4. The sale of he-camel sperm.
5. The sale of unfertilized eggs of she-camels.
6. A sale with a condition other than: (i) pawning, (ii) guaranty, (iii) witnessing, (iv) option, (v) deferment, (vi) freeing of a slave, (vii) non-existence of defects in the object of sale, including defects to the internal organs of a sold animal, (viii) transportation of the object of sale from the seller's point of origin, (ix) cutting of fruits or leaving them after their goodness is manifested, (x) description, such as “a typewriter that can type in specific languages”, (xi) the condition that the seller will not deliver the object of sale unless its price is received immediately and in full, or (xii) a condition to return the object of sale if it contains a defect.
7. “Touch sales”, where a buyer touches a folded dress or inspects it in a dark room, and then buys it without the option of returning it after he sees it, despite having been satisfied with touching it without seeing it at the time of sale.
8. “Discard sales”, where each of two parties discards a dress with the understanding that they have thus exchanged the two. In this type of sale, there is no option if the dimensions of the clothing are known. Another form of this sale is where a person discards an item to another for a monetary compensation that is a known price.
9. The sale of wheat in its spikes (*al-muhāqala*).
10. The sale of goods that cannot be owned, except in the cases of a forward sale (*salam*), or a lease with an increased price as a liability. The two listed exceptions render the sale valid despite the benefit from the object of sale not being exchanged at the contract time. Thus, a forward sale is valid, e.g. where the object of sale is an amount of wheat or a dress of specific characteristics, and where the seller does not possess such items at the time of the sale. It is also valid to lease an item that is currently a liability on another. Thus, a lessor may lease a transportation animal to the lessee beginning at a future date, even though he will only collect that animal at a point in time after the inception of the lease contract. It is also valid to trade a fungible good that is currently a liability on another in exchange for another fungible good that is a liability on a fourth party. In such a case, both parties may collect the items from the liable parties and exchange the objects of sale prior to parting.

The proof of the invalidity of selling un-owned objects is the narrated *Hadīth*: “There is no divorce except in what is yours, no freeing of slaves except in what you own, and no sale except in what you own”.²²³ Their ruling on the invalidity of the sale of an uncommissioned agent (*al-fudūlī*) was based on this *Hadīth*.

11. The exchange of meat for an animal (even if the latter is not edible). Thus, the exchange of cow-meat for cows, sheep, or a donkey, are all considered invalid based on the prohibition in a *Hadīth* narrated by Al-Tirmidhī.
12. The exchange of one milk producing sheep for another. Similarly, the exchange of an edible animal or one carrying eggs for another is rendered invalid. This ruling is based on ignorance of the appropriate price or compensation for the milk or eggs, etc. Thus, such a sale is compared to the sale of a *Dirham* and a dress in exchange for a *Dirham* and a dress.
13. “Pebble sales”, where a person sells another whichever dress a pebble falls on.
14. The sale of running water or the water of a natural spring, even for a specific period. Such water are not owned, and their amount is constantly changing and thus unknown. This renders the object of sale undeliverable. However, if one sells such water to another with a condition of collection of the water, then the sale becomes valid. Also, the sale of still water is permissible, provided that its volume is measured or estimated.
15. The sale of fruits before their goodness is manifested without a condition of cutting. This opinion is based on the explicit prohibition in the *Hadīth* of selling fruits before their goodness is manifested. However, if the condition of cutting is stipulated before or after goodness is manifested, the sale is permissible. In this case, if a person sells a pollinated date-palm, then its dates belong to the seller, otherwise, they belong to the buyer.
16. The exchange of fresh dates for fresh or dried dates, or
17. The exchange of fresh grapes for fresh grapes or raisins. The invalidity in both cases is based on ignorance of equality in amount after the object of sale dries. “The Prophet (pbuh) was asked regarding the exchange of fresh dates for dried dates, and he asked: ‘Will the fresh dates be reduced in volume or weight when they dry?’, they said: ‘Yes’, he (pbuh) said: ‘Then no’.”²²⁴ However, jurists allowed such sales to meet needs, as long as the amount being sold was no more than 653 kg.
18. The exchange of fresh wheat for fresh wheat, or

²²³Narrated and deemed a (*Hadīth hasan*) by Al-Tirmidhī.

²²⁴Narrated by Al-Tirmidhī who deemed it a *Hadīth sahīh*.

19. The exchange of fresh wheat for dried wheat in different quantities, if they are of the same genus. In such cases, the equality of the two exchanged amounts is unknown, and *ribā* is perpetrated.
20. The exchange of fresh meat for fresh meat, if they are of the same genus,
21. The exchange of fresh meat for dried meat, or
22. The exchange of dried meat for dried meat, of different amounts if they are of the same genus. In all such cases, *ribā* is perpetrated as in the case of selling cow-meat for cow-meat in different quantities.
Note that the types of meats, milks, fats, fishes, shell-fishes, breads, etc. can be of different genera. Thus, it is permissible to exchange items of different genera in different quantities, e.g. cow-meat for sheep-meat of different amounts.
23. The sale of impure objects, e.g. a dog, for which a price was forbidden, or a pig.
24. The sale of a free man,
25. The sale of a slave woman who gave birth to her owner's child, or
26. The sale of a slave under a contract permitting him to buy his freedom.
27. The sale of insects, scorpions, and rats, in which there is no benefit to compensate for the paid price.
28. The sale of a male animal's services for reproduction, which was forbidden in a narration by Al-Bukhārī.
29. The sale of a Muslim slave to a non-Muslim, since the ownership of a Muslim by a non-Muslim is a humiliation.
30. *Gharar* sales, e.g. musk in its container, and wool on the backs of sheep, where the prohibition is based on ignorance of the quantity being sold.
31. ^c*Arāyā* sale, which is the sale of fresh dates on the palm in exchange for dried dates, or fresh grapes on the vine in exchange for raisins, if the amount is more than 653 kg. In amounts less than 653 kg, the exchange is permissible after the goodness of the fresh fruits is manifested. The Prophet (pbuh) permitted this sale for fresh dates. Grapes were added to the ruling based on analogy (*qiyās*), since both are fungibles. In such cases, the volume of the fruits on the tree should be estimated, and the dried ones should be weighed, and not vice versa.

Invalid sales for the Hanbalīs

Those were discussed in detail in the section dealing with the conditions of a sale.

Forbidden but valid sales for the Shāfi‘īs

There are eight sales contracts that the Shāfi‘īs render forbidden (*harām*) but valid:²²⁵

1. **Sale of an animal whose milk was forced to accumulate in its udder** for days to give potential buyers the false impression that it produces a large quantity of milk (*bay‘ al-muṣarrāh*). This type of sale is forbidden (*harām*) but valid. The prohibition is based on a *Hadīth* narrated by Al-Bukhārī and Muslim on the authority of Abū Hurayra: “Do not let milk accumulate in the udders of camels and sheep ...”.
2. **The sale of a city-dweller on behalf of a bedouin.** This refers to the case where a city dweller meets an incoming trader and convinces him not to sell his goods, offering to sell them on his behalf over a period of time, knowing that the residents of the city are in need of those goods. This sale is forbidden due to the *Hadīth* narrated by Al-Bukhārī and Muslim on the authority of ’Ibn ‘Abbās: “Let not the city dweller sell on behalf of a bedouin”.
3. **Meeting a caravan outside the city** to buy their goods at a price lower than that borne in the market. This sale is forbidden based on the *Hadīth* narrated by Muslim on the authority of ’Abū Hurayra: “Do not meet the caravans outside the city to buy their goods”.
4. **Monopoly**, i.e. the storage of goods that are needed by people awaiting the rise of their prices, is forbidden. This is based on the *Hadīth* narrated by Muslim on the authority of Mu‘ammar ibn ‘Abd Allāh Al-‘Adawī: “Only a sinner practices monopoly”, since it leads to hardship for the people.
5. **Artificial price hiking** (*bay‘ al-najash*), where a person bids-up the price, with no intention to buy the item, to induce others to buy the goods at the higher price. This trick is forbidden by the *Hadīth* narrated by Al-Bukhārī and Muslim on the authority of ‘Abd Allāh ibn ‘Umar: “The Prophet (pbuh) forbade al-najash”.
6. **Bargaining to replace bargaining, buying to replace buying, and selling to replace selling** are all forbidden. Thus, after the negotiating parties have agreed on a price, it is forbidden for a third party to try to intervene before the sale is concluded to bargain with one of the parties. It is also forbidden to replace another’s sale before the sale is binding, i.e. during the session or condition option period while the sale may be voided. In this case, it is forbidden for a third party to invite the buyer to void his sale so that he can sell him a similar item at a lower price or a better item at an equal or lower price. Similarly, it is forbidden for a third party to replace the buyer during the option period by suggesting to the seller that

²²⁵ Al-Khatīb Al-Shirbīnī ((Shāfi‘ī)), vol.2, pp.35-38).

he should void the sale and that he will buy the item at a higher price. The proofs of those prohibitions are in the following *Hadiths*: Al-Bukhārī and Muslim narrated: “A Muslim should not replace the bargaining of his brother”, or “Let not a man replace the sale of his brother”. Al-Nasā’i added in his narration: “Until he either concludes the sale or leaves it”. The replacement of a purchase is included in meaning in the prohibition of the replacement of a sale. The purpose of the prohibition is avoidance of causing harm, disputes, enmity, and hatred.

7. **Sales to a person whose entire wealth is known to be from forbidden sources (*māluhu harām*)**. For instance, if it is known that all the monies of a potential buyer were earned through the sales of pigs, wine, dead animals, or dogs, or that it was earned illegally through bribes, gambling, singing, dancing, or prostitution and pimping, then selling to this person is forbidden.

However, if the potential buyer’s wealth was not all *harām*, but a combination, then dealing with him is reprehensible (*makruh*). This ruling is based on the *Hadīth* narrated on the authority of Al-Nu‘mān ibn Bashīr: “The permissible is clear, and the forbidden is clear, and between them there are many ambiguous things unknown to most people; so the one who avoids the ambiguous things has saved his religion and honor, and the one who falls into the ambiguous things would have fallen into the forbidden”.

8. **The sale of fresh or dried dates and grapes to a wine maker**, who is known or strongly suspected to plan to use them for wine-making, is forbidden. Similarly, the sale of beardless boys to one who is known to commit adultery/rape with them, weapons to a criminal or pirate, and any sale of an item to a person who is expected to use them in violation of Islamic Law, are all forbidden. However, if the degree of doubt that the sold item will be used illegally is minor, then the sale is merely reprehensible (*makruh*).

Chapter 5

Options

As we have seen above, a binding contract is one that does not contain any options that give one of the parties the right to void the contract. An option based on a condition, inspection, or the finding of defect (*khiyār al-shart*, *khiyār al-ru'ya*, or *khiyār al-^cayb*, respectively) is by definition a choice for one of the parties whether to conclude the contract or to void it. On the other hand, a selection option (*khiyār al-ta^cyīn*) gives one of the parties the right to choose one of two objects of sale.¹ It is clear that the default in a sale contract is that it is binding, since its intention is the transfer of property. However, the Legislator has allowed for certain types of options to meet the needs of the contracting parties.

Types of options

The Ḥanafīs enumerated seventeen options, which are the options (*khiyārāt*) of:² (1) a condition (*al-shart*), (2) inspection (*al-ru'ya*), (3) defect (*al-^cayb*), (4) description (*al-wasf*), (5) cash payment (*al-naqd*), (6) specification/selection (*al-ta^cyīn*), (7) injustice through excessive ignorance or uncertainty (*al-ghubn ma^ca al-taghrīr*), (8) quantity (*al-kammiya*), (9) entitlement (*'istihqāq*), (10) purposeful and active deception (*al-taghrīr al-fīliy*), (11) discovery of condition (*kashf al-hāl*), (12, 13) betrayal in a cost-plus or at-cost sale (*murābāha* or *tawliya*), (14) partitioning of the contract (*tafriq al-safqa*) due to the perishing of part of the object of sale, (15) permission of the sale of an uncommissioned agent (*bay^c al-fudūlī*), (16, 17) a third party having a right in the object of sale, due to its lease or pawning. The first seven of those options are the ones mentioned in *Al-Majalla* (M: 300-360).

The Mālikīs recognized two types of options.³

1. The option given to the parties of a sale to ponder the contract; this is the

¹ *Al-'Amwāl wa Nazariyyat Al-^cAqd* by Dr. Muḥammad Yūsuf Mūsā, (p.466).

² Ibn Ḩibdīn ((Hanafī)), vol.4, p.47).

³ Al-Dardīr ((Mālikī))A, vol.3, p.91), 'Ibn Juzayy ((Mālikī)), pp.272-274), 'Ibn Rushd Al-Hafid ((Mālikī)), vol.2, p.169).

option based on condition (*khiyār al-shart*) that is the default meaning of the term “option”.

2. The option due to diminution (*khiyār al-naqīṣa*), which is caused by a reduction in the object of sale due to a defect or entitlement. This is called the legal option since it elicits a legal judgment.

The Mālikīs, however, render the option of the contract session (*khiyār al-majlis*) invalid. This is the opinion of the seven jurists of the Madīna as well as 'Abū Ḥanīfa. Thus, they consider the sale concluded once the offer and acceptance have been uttered, even if the parties to the contract have not parted from the contract session. This is in contrast to the permission of this type of option by Al-Shāfi'ī, 'Ibn Ḥanbal, Sufyān Al-Thawrī, and 'Ishāq. The latter opinion is that the parties to the contract maintain the option to dissolve it after its conclusion as long as they have not parted from their session. This opinion is based on the valid *Hadīth* listed above in the discussion of the cornerstones of a sale.

The Shāfi'īs classify options into two types:⁴

1. Choice options (*khiyār al-tashahhi*), which include the options based on the choices and wishes of the parties to the contract with no reference to any diminution in the object of sale. Those options are based on the continuation of the sale session or a stipulated condition.
2. Diminution options (*khiyār al-naqīṣa*), which are caused by a verbal disagreement, a purposive and active deception, or a conventional legal judgment. Among such options are the option based on defect, *Al-tasriya*⁵, verbal disagreement with reality, meeting the caravans outside the town, etc.

Based on this classification, the Shāfi'īs enumerate sixteen valid options:

1. Session option (*khiyār al-majlis*), based on the *Hadīth* narrated by Al-Bukhārī and Muslim.
2. Condition option (*khiyār al-shart*), which may not be extended beyond three days. This option is based on the account narrated in Al-Bayhaqī and other sources. If the period of this option is extended beyond the three days, it renders the contract invalid since it would then contain a defective condition.
3. Defect option (*khiyār al-ayb*) once the defect is discovered, whether the defect existed before the sale, or after the conclusion of the sale but prior to receipt. The validity of this option is based on the account narrated in Al-Trimidhī and others.

⁴Al-Khatib Al-Shirbī ((Shāfi'ī), vol.2, p.43), Al-Sharqāwī ((Shāfi'ī), pp.150-152), Al-Sharqāwī ((Shāfi'ī), *Hāsiyya*, vol.2, pp.40-50).

⁵Mentioned above, which constitutes tying the udders of a she-camel, female sheep, etc. to trick the buyer into thinking that it produces more milk than it actually does. This is an example of deception by action and in description.

4. The option of meeting the caravans outside the city (*talaqqī al-rukbān*), if the merchants of the caravan discover that the market price is higher than that offered them by the person who met the caravan. The validity of this option is based on the account narrated in Al-Bukhārī and Muslim.
5. Partition of the contract option (*khiyār tafarruq al-safqa*), where part of the object of sale is spoiled prior to the sale or prior to receipt. An example of the former include the sale of a permissible and a prohibited item in one contract while the buyer does not recognize that one of the items is impermissible.
6. Loss of characteristic option (*khiyār faqd al-wasf*), i.e. if one of the desired characteristics of the object of sale is no longer present.
7. (joint with 8)
8. An option based on ignorance that the object of sale was usurped, given that it can be recovered from the usurper. This option is made valid to prevent the potential harm that the buyer may face while recovering the item from the usurper.
9. An option based on ignorance whether the object of sale is planted or leased.
10. An option based on the inability to meet a valid condition, e.g. the condition of a pawned object or a guarantor in a sale.
11. An option based on potential disagreement on the method of executing the contract, despite agreeing on its validity. In this case, one of them may void the contract, or the judge may void it if they disagree. In the latter case, the voiding of the contract may only ensue after they each swear an oath denying the other's claim.
12. An option to the seller who discovers that the price of an object sold on a cost-plus basis was exaggerated. Thus, if the seller bought an item for 100, and he then sold it for 110, claiming to the buyer that he had bought it for 110, and the buyer believed him, the seller has the option. This option follows since the profit he makes in this case is not legitimate.
13. An option to the buyer if sold fruits are intermixed with newly grown ones prior to being given access to the tree carrying the fruits. If the seller does not give him the new fruits as a gift, he has the option.
14. An option based on the buyer's inability to pay the price after receiving the object of sale. The validity of his option to return the object in this case is based on the account narrated in Al-Bukhārī and Muslim.
15. An option caused by a change in the characteristics of the object of sale after inspection, even if the change does not constitute a defect.

16. An option based on a defect in the fruits caused by the seller's not watering the plants after giving the buyer access.

The Ḥanbalīs enumerated eight types of options:⁶ (1) the contract session option, (2) the condition option, (3) the deception option, (4) the concealment (of defect) option, (5) the defect option, (6) the betrayal option, (7) the option based on the parties disagreeing over the price, or the disagreement of lessor and lessee over the rent, and (8) the option based on the partitioning of the contract.

In what follows, I shall – with the help of Allāh – discuss in detail the three most prominent options: (1) the condition option, (2) the defect option, and (3) the inspection option. The other types of options will be discussed in less detail, and we remind the reader that the contract session option has been discussed in detail above.

5.1 Characteristics option *khiyār al-wasf*

This option comes into effect if one of the desired characteristics of the object of sale becomes missing.⁷ The Ḥanafīs define this option as follows: The buyer has the option whether he accepts the sale for the full stated price, or to void the sale if the object of sale is missing one or more of its desired characteristics. This applies to sales where the object of sale is absent from the contract session. For instance, if he buys a cow based on the description that it produces milk, and then it is found that it doesn't, or if he buys an object based on the description that it is a genuine gem, but it turns out to be an artificial imitation of the original, then the buyer has the option to retain the object in exchange for the entire price or to void the sale. Such characteristics are clearly desired in the object of sale, and may be made a condition of the sale. Thus, if such characteristics are found lacking, the buyer must get the option. In this regard, since the buyer would not have accepted the object of sale without this characteristic, its absence is equivalent to a defect in the object.

The Ḥanafīs explain why if the buyer decides not to exercise his option and void the sale, then he has to accept the object in exchange for the full price as follows: there is no explicit portion of the price of the object corresponding to each of its characteristics. In fact, the characteristics of the object are a non-separable part of the object, and that is how they are treated in the contract.

The proof the validity of this option is based on juristic approbation of jurists (*'istihṣān*), which is opposed to the ruling based on analogy alone (*qiyās*). The Shāfi'īs and Ḥanbalīs consider this option a special case of the defect option (*khiyār al-^cayb*).

⁶Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, pp.166,186-187,190,199,201,203,217,224).

⁷Ibn 'Abidīn ((Ḥanafī), vol.4, p.49), *Al-Majalla* (M: 310-312), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.135 onwards).

5.1.1 Option conditions

1. That the characteristic of the object of sale, the satisfaction of which is stipulated as a condition, is legally permissible. Thus, if the characteristic was forbidden, the condition becomes invalid.
2. That the characteristic be one that is usually desired. Thus, if the characteristic is not considered customarily desirable, the condition is nullified, and the sale is rendered valid without an option. For instance, the characteristics of the sex of an animal is nugatory, and if a person buys an animal assuming that it was a male and finds out it is female, the sale is valid, and there is no option for the buyer.
3. That the specification of the desired characteristic does not lead to ignorance that may in turn result in dispute. If the specification of the characteristic does lead to such dispute, the condition and the sale are both rendered defective. For example, if a person makes it a condition that the cow being purchased must produce so many pounds of milk per day, the condition is rendered defective since it cannot be controlled.

5.1.2 Status

1. The characteristics option is inherited. Thus, if the buyer who has a characteristics option dies, and the object is discovered after his death to lack the specified characteristic, the heir has the option to void the sale.
2. If the buyer with a characteristics option deals in the object of sale as its owner, the option is null.
3. The buyer with such an option has the right to either void the sale or retain the object in exchange for the full price. However, if the object of sale perishes or becomes defective while in the possession of the buyer, he may return it to the seller in exchange for a fair assessment of the value of the object less the missing characteristic. This value can be determined by pricing the object with and without the characteristic in question. The buyer is due the differences between the two prices.

5.2 Price payment option (*khiyār al-naqd*)

This option⁸ is a special case of condition options. It is in effect if the parties to a sale with a deferred price specify that the sale is void unless the price is paid within three days. Notice that three days is the permissible period for a condition option, thus if the condition is that the sale is void if the price is not paid within four days, the contract is invalid. This is in contrast to the opinion

⁸ Al-Sarakhsī (1st edition (Hanafī), vol.13, p.50), 'Ibn Al-Humām ((Hanafī), vol.5, p.114 onwards), 'Ibn c-Abidīn ((Hanafī), vol.4, p.51), *Al-Majalla* (M: 313-315), Al-Buhūtī (3rd printing (Hanbali), vol.3, p.184).

of Muhammad, who allowed the specification of any mutually agreeable period, taking into consideration the best interest of the parties of the contract.

If the price is paid within three days, there is a consensus among the Ḥanafīs that the sale is permissible, since the price payment option follows the same rulings for condition options. This option is also valid for the Ḥanbalīs based on the condition option, but they consider the sale void if the price is not paid within the three days.

Another form this option may take is where the seller stipulates that if he returns the price to the buyer within three days, then the sale is void.

The difference between the price payment option and the condition option is that the default for condition options is that they are binding. Thus, if the period of a condition option passes without the contract being voided, it becomes binding by default. In contrast, the default for a price payment option is that the sale is non-binding. Thus, if the price is not paid within the three days, the sale becomes defective, provided that the object of sale remains in its original condition. It does not become void. The proof of this opinion is the general rule that the buyer takes possession of the object of sale upon the seller's receipt of the price. The Ḥanbalīs, however, ruled that the sale would be voided in this case, and the Ḥanafīs with the exception of Zufar agree with this opinion. This opinion is based on classifying this option as a special case of condition options (*khiyār al-shart*). However, Zufar disagreed based on the opinion that this is a condition that is not a prerequisite of the contract, and results in a benefit to the one who has the option.

5.2.1 When is this option dropped ?

1. If the buyer with a price payment option dies during the option period, the sale is rendered invalid.
2. If the buyer deals in the object of sale by reselling it or otherwise during the option period and before paying the price, the option is dropped, the sale is rendered valid and binding, and the payment of the price becomes binding on him.
3. If the buyer or a third party caused a defect in the object during the option period after receipt, the option is dropped due to the impossibility of returning the object.
4. If the buyer causes a defect in the object that prevents him from returning it to the seller, even before the price is paid, the option is dropped. In this case, the seller has the option of taking the defective object and surrendering his claim to the price, or leaving the object with the buyer and demanding the price.

5.3 Specification option (*khiyār al-ta^cyīn*)

This is the type of option⁹ ensues if the parties to the contract agree to postpone specifying the object of sale that must be specified for a known period, giving the option of specifying the object to one of them. For instance, if a person buys an unspecified dress out of two or three, where he has the option to take whichever one he wishes within three days.

In similarity to the price payment option, there is a reverse side to this option: the buyer may either take one of the objects of sale at the price he agreed upon with the seller, or the seller may give the buyer whichever one of the objects he chooses, and make the sale binding on the buyer unless the buyer was absent in which case it must be by mutual consent. If one of the objects of sale were to perish, the seller may make it binding on the buyer to select one of the others.

The Ḥanafīs rendered this option valid based on juristic approbation (*'istihṣān*) due to people's need for such options. They have thus overruled the harm caused by the ignorance of the object of sale based on convention and benefit to the contracting parties. The Shāfi'īs and Ḥanbalīs, on the other hand, have rendered the option invalid due to the resulting ignorance (*jahāla*).

The Ḥanafīs further stipulate that it is not necessary for this option to be tied to a condition option, but that it is permissible for the parties of the contract to make it thus.

5.3.1 Option conditions

The Ḥanafīs have stipulated the following conditions for the specification option:

1. That the selection be among two or three items and not more. Their ruling is based on the view that all things can be classified into three categories: high, medium, and low quality, thus making it redundant to allow a selection among four or more items.
2. That the seller agrees explicitly to this option, e.g. by saying to the buyer: "I have sold you one of those two or three items, and you have the option of selecting which one". If the seller does not agree to this option, the sale is rendered defective based on ignorance.
3. That the objects of sale are non-fungibles (e.g. clothes or furniture) and not fungibles (e.g. new printed books), since there is no benefit in specifying one item out of a group of fungibles that are virtually identical.
4. That its period is the same as that of the condition option, which is three days for 'Abū Ḥanīfa and any known and mutually agreeable period for 'Abū Yūsuf and Muḥammad.

⁹Ibn Al-Humām ((Hanafī), vol.5, pp.125,130), 'Ibn Ḩāfiẓ Abidīn ((Hanafī), vol.4, p.60 onwards), *Al-Majalla* (M: 316-319).

5.3.2 Status

1. The sale is binding on an unidentified element from the agreed upon set of objects of sale. It is binding on the party with the option to specify the object he will purchase within the option period, and to pay its price.
2. This option is inheritable in the view of the Ḥanafī jurists, in contrast to the condition option. Thus, if a buyer with a specification option were to die prior to specifying the object of the sale, it is binding on the heir to specify one of the objects and to pay its price.
3. If one of two objects in a sale with a specification option were to perish, the other object automatically becomes the object of sale, and whatever remains is considered a liability-in-kind (*'amāna*) on the buyer. If both objects of sale were to perish, the buyer is bound to pay half the price of each, since neither was specified. If the two were to perish sequentially, the first to perish is considered the object of sale. If the parties disagree on the order in which the objects perished, then an oath by the buyer may specify it, but evidence the seller may show would have priority. The treatment of a new defect is the same as the treatment of perishing discussed above. If the buyer sells both objects and then selects one, then his sale of that object is valid. In this case, the liability for the object of sale is for its price, while the liability for the other is in-kind.

5.4 Fraud option (*khiyār al-ghubn*)

This option¹⁰ is legally permissible for the Ḥanafīs if the fraud is based on deception. Thus, it is commonly called the fraudulent deception option (*khiyār al-ghubn ma'a al-taghrīr*). The deception by the buyer or seller may be verbal by communicating unfair prices, or by action by communicating a false description of the object of sale. The degree of fraud is considered minor (*ghubn yasīr*) if the resulting difference in price falls within reasonable assessments of the value of the object; otherwise, it is considered major (*ghubn fāhish*), since the unjust increase in price is certain in this case.¹¹ In this case, the right to void the contract is established to remove the injustice.

Verbal deception in price results if the seller or lessor says to the buyer or lessee: “this item is worth more, and you can never find its equal”, or “so-and-so paid me so-much for it”, etc. while none of this is true.

Actual deception in description results if the seller or buyer fraudulently claims that the object of sale contains a characteristic that it does not. For instance, a seller may put the best quality items on the top of a display, hiding the worst at the bottom, to give the impression that the average quality is higher than it is in reality. Other examples involve forcing milk to accumulate in the udder of an animal. All such behavior is strictly forbidden (*harām*), and gives

¹⁰Ibn Ḩāfiṣ ((Hanafī), vol.4, p.47), *Al-Majalla* (M:256-360).

¹¹Al-Kāsānī ((Hanafī), vol.6, p.30).

the deceived party the option to void the contract in analogy to the right to void if a conditionally stipulated characteristic was missing. As for not revealing a hidden defect that one of the parties knows, this comes under the defect option (*khiyār al-^cayb*).

5.4.1 Status

The deceived party is given the right to void the contract to remove the unjust loss he suffered. In this case, it is ruled that his consent was never realized due to the deception and grave injustice. However, if the victim of fraudulent deception dies, the right to void is not inherited by his heir.

If the deceived buyer deals in the object of sale after discovering the grave injustice, builds on the land thus purchased, or if the object perishes, is consumed, or a new defect befalls it, then the right to void the contract is dropped.

The Hanbalis distinguish between three categories of options relevant for this section: (1) the fraud option, (2) the concealment option, and (3) the defect option.¹²

5.4.2 Three Hanbalī categories: *ghubn*, *tadlīs*, and ^c*ayb*

1. Types of deception (*ghubn*)

1. Meeting the caravans outside the city: This category includes all incoming traders with goods to sell, even if they are traveling on-foot. The majority of jurists render this behavior forbidden (*ḥarām*), while the Hanafis rendered it reprehensible (*makrūh*), even if the person did not intentionally go out of the city to meet them. Thus, if the one who meets the caravan buys from them or sells to them, they have the option to void those transaction once they reach the market and discover that they were deceived into trading at unusually high or low prices. This option is rendered valid by the *Hadīth*:¹³ “Do not meet incoming traders outside the market; and if they do trade with someone and then reach the market, they have the option”.
2. Price-hiking (*Al-Najash*): This is the practice where a third party intentionally bids-up the price of an object with no intention of buying it. This practice is forbidden (*ḥarām*) since it deceives the buyer, and the buyer in this case has the option if he bought at an unusually high price. Notice that the sale is not considered a *najash* unless the third party was clever and the buyer was ignorant of the price. Thus, if the buyer was alert to this possibility but still fell prey to the trick, then he has no option, and should blame his loss on his haste. If a third party with no intention to buy bids-up the price without cooperation with the seller, or if the seller

¹²Ibn Qudāmah (, vol.4, pp.134-142), Al-Buhūtī (3rd printing (Hanbalī), vol.3, pp.199,201,203).

¹³Narrated by Muslim on the authority of 'Abū Hurayrah

himself raises the price, while the buyer does not know, then he has the option to keep the object of sale or return it, since deception still exists.

3. Sale or lease with unsound judgment (*bay^c al-mustarsil*): The “unsound judgment” in this category may result from ignorance of the value of the object of sale by either the buyer or the seller. In this case, if the injustice in pricing was unusually high, the deceived party has an option. His claim of ignorance is accepted by his oath, unless a close associate disputes his claim of ignorance, in which case it is not accepted.

Their opinions are as flexible for the fraud option as they are in the defect option.

2. Concealment of defect (*al-tadlis*)

The option given to the buyer of an object with a defect that was concealed by the seller is based on deception, while the contract is considered valid. There are two types of concealment, both of which are forbidden (*harām*):

1. Concealment of a defect, and then the option will be called by the Ḥanafīs a defect option (*khiyār al-^cayb*).
2. An action that raises the price, even if there is no defect in the object. For example holding the water of a mill and releasing it at the time of sale to make it unusually fast in its rotation, thus deceiving the buyer into paying more for it. Other examples include improving the looks of a pile of goods, polishing the top of shoes, showing the best part of a dress, forcefully collecting milk in the udder of an animal, etc. This is called an active deception in the description of the object by the Ḥanafīs.

In both types of concealment or deception, the buyer has the option to return the object if he was not aware of the defect, or to keep the object. This ruling is based on the *Hadīth*.¹⁴ “Do not forcefully keep the milk in the udders of camels and sheep, and if one buys it thus, then he has the option after milking it, he may keep it or return it together with a container of dates” as compensation for the milk?. Other forms of concealment inherit the same legal status as forcefully keeping the milk in the animal’s udder.

The majority of jurists and 'Abū Yūsuf have accepted the implication of this *Hadīth*, which is giving the buyer the option to keep the object or to return it with one container of dates. However, 'Abū Ḥanīfa and Muhammad ruled that the buyer may return it with the decrease if he wishes.

3. Defect option (*khiyār al-^cayb*)

The defect option in the Ḥanbalī school, on the other hand, must be caused by a diminution in the object of sale itself, e.g. the castration of an animal, even if that results in an increase rather than a decrease in its value. They also include

¹⁴Agreed upon on the authority of 'Abū Hurayrah, and it is a *Hadīth marfu'*.

cases where the value of the object would decrease in common pricing, even if the object of sale itself is not diminished in any way.

5.5 Revelation option (*khiyār kashf al-hāl*)

This option¹⁵ is in effect if a person buys an item of unknown weight, or unknown volume. For instance, if a person buys an amount of gold of the same weight as “this stone”, or this pile of food for a specified price per measure of volume. In both such cases, the sale is valid, and the buyer has the option to conclude the sale or void it.

5.6 Betrayal option (*khiyār al-khiyānah*)

This option¹⁶ is in effect in trust sales (*buyūc al-'amānah*) such as sales at-cost, partnership, cost-plus, or below-cost sales if the seller informs the buyer of an increase in the price, or conceals a deferment. In such cases, if the seller's statement is found to be false by proof or confession (the Ḥanafīs also include refusing to swear that he told the truth as proof that he lied), then the Hanafīs and Mālikīs give the buyer the option of taking the object of sale at the full stated price, or returning it, since his consent was never established. In the case of at-cost sales, he may take the object at an appropriately reduced price (i.e. at the true cost of the object). On the other hand, the majority of the Shafi'īs and the Ḥanbalīs ruled that the buyer has no option in this case, but that he has the right to reduce the price by the appropriate amount to compensate for the misrepresentation of the seller.

5.7 Sale partition option (*khiyār tafarruq al-safqa*)

This option¹⁷ is given to the buyer if the object of sale is partitioned. In this case, he has the choice whether to void the sale and recover the entire price if paid, or take the remainder of the object of sale after deducting the appropriate amount from the price to account for the defect or perishing that befell part of the object. There are many forms that this option may take, and they are discussed in some detail in what follows.

For the Ḥanafīs, this option comes into effect if part of the object of sale perishes or becomes defective while it is in the possession of the seller (i.e. prior to receipt by the buyer). If the perishing of part of the object of sale was caused

¹⁵Ibn ḨAbidīn ((Hanafī), vol.4, p.47).

¹⁶Ibn ḨAbidīn ((Hanafī), vol.4, p.47), Al-Dardīr ((Mālikī)A, vol.3, p.168 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.79), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.217 onwards).

¹⁷Ibn ḨAbidīn ((Hanafī), vol.4, p.47), Al-Dardīr ((Mālikī)A, vol.3, p.469), 'Ibn Juzayy ((Mālikī), p.260), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.40), 'Abū-'Isḥāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.269), 'Ibn Qudāmah (, vol.4, p.238), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.166 onwards, p.291).

by a natural event or by the seller, then the sale is rendered invalid. However, if the perishing occurred because of actions by a third party, then the buyer has the option to void the contract, or to conclude it holding the third party liable for the damage.

The Mālikīs ruled that this option comes into effect if the object of sale is defective, or if some members of a group of items sold in one contract become defective or perish. In the latter case, the sale must be voided in their opinion, and the buyer does not have a right to keep the remainder of what was sold. In the former case, the buyer does have the option to retain the remainder of the object of sale in return for a price to be determined by assessment of value, rather than as a percentage of the original price. Thus, if the remaining part is assessed to be worth eight, and the part that was ruined was assessed to be worth two if it were in good form, the buyer should get back one-fifth of the price he paid to the seller.

However, if the contract consisted of some permissible and some impermissible items (e.g. a permissible good together with wine or pork, etc.), then the Mālikīs ruled that the entire contract is invalid. In contrast, if a person sells some of his property together with the property of another in one contract, then the sale is valid in both. In this case, the sale is binding on the part that is the seller's property, and the bindingness of the other part is suspended pending the consent of its owner.

Al-Shāfi‘ī considered three categories of partitioning or enumeration of the components of a contract:

1. If a person sells permissible and forbidden items in one contract (e.g. a legally slaughtered sheep and a dead animal, vinegar and wine, a sheep and a pig, something owned by himself and another owned by another person, or an item for which others share some rights without the permission of those parties) then the sale is valid for any item that is permissible and that is owned exclusively by the seller, and the best opinion is that the sale is invalid for the other components. Thus, each of the components of the contract has its own legal status. If the buyer did not know the status of all the components of the sale, then he has an option to take the permissible part that was owned by the seller in exchange for a price determined by its value, or to void the contract. The option comes into effect in this case since the partitioning of the object of sale can cause potential loss to the buyer. However, the seller has no option in this case, since he has transgressed by attempting to sell that which is not permissible or that which is not his property.
2. If a person sells two items (say two pieces of furniture) to another, and then one piece becomes defective prior to its receipt, then the sale is voided for the defective item, but not for the other. In this case, the buyer has the option to void the entire contract, or to take the non-defective item based on its value and the value of the defective part. This follows since the price can be distributed among the two items at the inception of the

sale, and this possibility of distributing the price is not affected by the later defectiveness of one.

3. If two contracts of different legal status (e.g. a lease and a sale) are combined in one agreement (e.g. “I rented you my house for one month for so-much, and sold you this dress for one Dinār”), then both contracts according to the best opinion are valid. Similarly, the two contracts are valid if the two contracts combined in the agreement were a lease and a *salam* (e.g. “I rent you my house for a month, and I sell you a container of wheat that is a deferred liability on me for so-much”). In this case, the named price is distributed according to the values of the objects of the contracts; e.g. the rent for the leased house, and the value of the object of sale or *salam* for that item.

In general, a contract is partitioned if the seller explicitly specifies the price for each item (e.g. I sold you this for so-much, and this for so-much, etc.). Also, if a single buyer were to buy from multiple sellers in one agreement, the prices specified by each seller are associated with the item sold by that seller. Cases with multiple buyers and/or sellers are treated similarly.

In summary, the Shāfi‘īs have two opinions on the issue of partitioning of a contract. The more accepted view in their school is that the sale is considered invalid for the items for which it is not permissible, and valid for the permissible part. This opinion is based on the argument that invalidating both parts of the contract due to the invalidity of part is of lesser legitimacy than validating the part that is valid. Thus, each part of the contract maintains its legal status, neither part altering the status of the other. The other view of the Shāfi‘īs is that the contract cannot be partitioned, thus the entire contract must be invalidated according to this view.

The Ḥanbalīs defined the partitioning of a contract thus: “Partitioning of items purchased in one contract occurs if some of the items may be sold validly while others are invalid to sell, and if they were initially sold in one contract in exchange for one price”. They further explicate this definition by considering three types of contract partitioning:

1. If a person sells a known object together with an unknown one whose value is also unknown. For instance, if a person says: “I sold you this mare, together with what is in the womb of this other mare, for so-much”, then the sale is invalid. In this case, the unknown object may not be sold due to ignorance, and the known may not be sold due to ignorance of its price, which cannot be imputed. To impute the price of the known object, the overall price must be distributed over the two options, but since the value of the unknown object (e.g. what is in the womb of the mare) is unknown, the imputation of the implied price for the other item in the sale becomes impossible.
2. If a person sells an item that is jointly owned (*mashā‘*) with another without the permission of his partner, the sale is valid for his share in

exchange for his share of its share of the price. This is in accordance with the view of the majority of Shāfi‘īs that is discussed above. If the buyer was not aware that the item was jointly owned, he has the option of keeping the share that was validly sold or voiding the contract. This follows since partnership with another is tantamount to a defect in the object he had thus purchased, thus justifying the option. However, if the buyer was aware of the partnership in the object of sale, then neither party has an option. If the buyer does keep the validly sold part of the object of sale, he is entitled to indemnity, as he would be if he purchased a single shoe from a pair.

3. If a person sells his property together with the property of another in one contract, without the permission of the other party, or if he sells vinegar and wine in one contract, then his sale is valid for his property in exchange for its share of the price, and for the vinegar for its share of the price. In this case, the price-share is determined by the ratio of the values of the two objects of sale. In the case of wine sold with vinegar, its value is assessed as if it were vinegar as well. In all such cases, the seller has no option. Those rulings are all in accordance with the view expressed by the majority of Shāfi‘ī jurists.

The Ḥanbalīs also ruled that if the sale consisted of items that are measured by volume or weight, and then part of the object of sale was rendered defective prior to receipt, the contract is not automatically voided. In this case, the buyer takes the remainder of the object of sale for its share in the price, since the contract was valid at its inception. Thus, the perishing or resulting defectiveness of part of the object of sale does not render the sale void, before or after receipt. The ruling is thus similar to finding one of two objects of sale defective after receipt, and returning in exchange for its share of the price. It is also similar to the ruling if one of the parties to the contract were to forgive the other from delivery of part of the object of sale.

5.8 Uncommissioned agent (*fudūlī*) sale option

This option¹⁸ comes into effect for the owner of an object if another sold his property without his commission. The Ḥanafīs and Mālikīs consider this sale suspended. The owner then has the choice whether to permit the contract, in which case it is executable, or to reject it, in which case it becomes invalid.

5.9 Option based on rights of others

This option¹⁹ comes into effect when a person has a right to an object of sale, whether that right is for a creditor pawn-broker, or a lessee. Thus, if a person

¹⁸Ibn ‘Abidīn ((Hanafī), vol.4, p.47 onwards), ‘Ibn Juzayy ((Mālikī), p.260).

¹⁹Ibn ‘Abidīn ((Hanafī), vol.4, p.48).

buys a house and then discovers that it is pawned or leased, he has the option whether to void the contract or not, to give him the ability to avoid a potential loss. The apparent interpretation of this opinion is that the option is valid even if he knew of this shared right at the inception of the contract; and this is the correct opinion according to which we rule.

If the lessee or pawn-broker were not to permit the sale, then the buyer has the option to void the contract, or to wait until the lease period is over or the pawning is revoked. However, if the lessee or pawn-broker were to permit the sale, then the buyer has no option.

5.10 Quantity option (*khiyār al-kimmiyya*)

This option²⁰ comes into effect if a person purchases an item in exchange for unseen items in a container or a hand, etc., where the seller does not know the quantity or type of objects contained therein. In this case, the seller has the option after opening the container or hand, thus seeing the price, whether to conclude the sale or void it. The Ḥanafīs call the quantity option (*khiyār al-kimmiyya*), to be contrasted with the inspection option (*khiyār al-ru'ya*) since the latter is not applicable when the unseen item is money.

5.11 Entitlement option (*khiyār al-'istihqāq*)

This option²¹ comes into effect for the buyer due to the entitlement of the whole object of sale or part of it. The Ḥanafīs explain this option as follows:

- If the entitlement for the object of sale takes place prior to receiving the full object of sale, the option is in effect for the entire object of sale; and if it takes place after receipt, then he is given the option in non-fungibles to the exclusion of fungibles measured by volume and weight.
- If the entitlement came into effect for part of the object of sale prior to receipt, the contract is rendered invalid for the entitled part, and the buyer is given the option of taking the remaining part in exchange for its share of the price, or returning the object of sale.
- If the entitlement came into effect for part of the object of sale after receipt, then the sale is rendered invalid for the part that is entitled. In this case, if the buyer can incur a loss by partitioning the object of sale (e.g. a house or a dress), then he has the option whether to keep the remainder for its share of the price, or to return it. If the partitioning cannot lead to a loss (e.g. if the object of sale is fungible, measured by volume or weight), then he is bound to keep the rest in exchange for its share of the price.

²⁰Ibn 'Abidīn ((Hanafī), vol.4, p.47).

²¹ibid.

All of those rulings are for the case where the party with the entitlement right does not allow the sale. However, if that party were to allow the sale, then there is no harm in partitioning, and the sale becomes binding on all parties.

5.12 Condition option (*khiyār al-shart*)

This option will be discussed in five subsections:

1. Defect-inducing versus legal options.
2. The duration of permitted options.
3. Means of dropping an option.
4. The status of the contract during the option period.
5. Means of voiding or permission.

5.12.1 Defect-inducing options (*al-khiyār al-mufsid*) vs. legal options (*al-khiyār al-mashru^c*)

Defect-inducing options (*al-khiyār al-mufsid*)

The Hanafīs, Shāfi‘īs, and the majority of the Ḥanbalīs have ruled that if the parties to a contract stipulate an eternal option, then the contract is not valid due to excessive ignorance (*jahāla fāhisha*). Examples include a person telling the other: (i) “I have sold (or I have bought) on condition that I have an eternal option”; or (ii) “on condition that I have an option”, thus mentioning the option unqualified by a time-period; or (iii) if he stipulates the option period to an unknown time such as “until Zayd comes”, or “until the wind blows”, or “until it rains”, or “some days”, etc.

However, the Shāfi‘īs and Ḥanbalīs considered the contract in this case to be invalid, while the Hanafīs consider it to be only defective. Thus, if the condition is dropped prior to the passage of three days, or if the excessive condition was removed or the period of option made specific, then the sale would become valid in the view of the Hanafīs, since the defect-inducing aspect would have been removed.²²

The proof of the Shāfi‘īs and Ḥanbalīs is that the period of the option becomes appended to the contract, and thus may not be unknown, in analogy to the impermissibility of ignorance of a deferment period. Moreover, they argue, the stipulation of an eternal option restricts the buyer from dealing in the object of his purchase forever, which is in conflict with the prerequisites of the contract. Thus, such an eternal option is as invalid as a sale with a condition that the buyer not be able to re-sell the item.

²² 'Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.259), 'Ibn Qudāmah (, vol.3, p.589).

The Hanafīs, on the other hand, find proof in the argument that the condition of an option alters the contract except in its essence. In this regard, it is only made permissible based on the *Hadīth* of Ḥibbān ibn Munqidh, in which the period of the option was specified to be three days. Thus, the contract discussed here remains in accordance with its essence except for the stated period of the option.

In contrast, Mālik, and 'Alīmad in one narration, have permitted options of unspecified periods. 'Imām 'Alīmad said in this regard: "They may then maintain the option eternally, they may cut it to a finite time, or it may expire". 'Imām Mālik, on the other hand, said: "The ruler (*Sulṭān*) decides an option period equal to conventional option periods of similar contracts; since the option is determined for any object of sale by convention, not specifying an option-period would be tantamount to specifying it to be of conventional length". The Mālikīs render the sale defective if an option period is stipulated for a period appreciably longer (i.e. a day or more) beyond its conventional length. They also consider the sale defective if the stipulated condition has an unknown term such as "until it rains", or "until Zayd comes".²³

Legal options (*al-khiyār al-mashru'*)

Permitted options are ones with an appropriately known period. We shall discuss the differences among jurists regarding such options. More generally, the legal permissibility of conditional options (*khiyār al-shart*) has been established by the *Hadīth* of Ḥibbān ibn Munqidh, who used to cheat in buying and selling. His family complained about this behavior to the Messenger of Allāh, who (pbuh) said: "If you sell, then say: no cheating,²⁴ and I have the option for three days". Its permissibility is further dictated by people's need for it to avoid being cheated.²⁵

The condition option is legally permissible in the opinion of the majority of Hanafī, Shāfi'i and other jurists, regardless of whether the condition was stipulated for one of the contracting parties or for another, to meet people's needs. Zufar, on the other hand, ruled that a condition option is valid only for a contracting party. Moreover, options and deferment are not valid for sales that may contain *ribā*, which are: (1) currency exchange (*sarf*), for the Hanafīs the sale of items measured by weight or volume, and for the Shāfi'iṣ exchanging food for food. All of those contracts require receipt prior to physical separation, and the mention of options or deferment contradict such immediate receipt.²⁶

²³ *Hāshiyat Al-Dusūqī* (vol.3, p.95), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.208).

²⁴ In other words, it is not permissible for you to cheat me, and if you do cheat me then I am not bound. We have authenticated its narrations previously in Al-dīḥākīm, Al-Bayhaqī, Al-Bukhārī, Muslim, 'Abū Dāwūd, Al-Nasā'ī, and Mālik, on the authority of 'Ibn 'Umar; c.f. *Tuhfah Al-Fuqahā'* with the authentication of its *Hadīths* by the author with Professor Al-Kittānī (vol.2, p.82).

²⁵ Al-Šan'ānī (2nd printing, vol.3, p.35), Al-Kāsānī ((Hanafī), vol.5, p.174), Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.5, p.108).

²⁶ 'Ibn Al-Humām ((Hanafī), vol.5, p.372), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.258).

5.12.2 Jurist opinions regarding option period

Jurists took three distinct positions on the period of an option:

1. 'Abū Ḥanīfa, Zufar, and Al-Shāfi'ī ruled that stipulating an option as a condition with a known period is valid for any period of three days or less. Their proof is that options are originally forbidden since they prevent the transfer of property or its bindingness, thus resulting in a conflict with the nature of a sale. However, an exception to this original ruling were established based on the *Hadīth* of Hibbān ibn Munqidh listed above, which was narrated by 'Ibn 'Umar. The period for this exception was established by the *Hadīth* of 'Anas: "A man bought an animal from another, and stipulated an option for four days, but the Messenger of Allah (pbuh) voided the sale, and he said: 'options are [only] for three days'."²⁷ Another argument for the three-day period is that it is customarily sufficient to meet the needs of the contracting parties. Thus, if the period is in excess of three days, the sale is defective for 'Abū Ḥanīfa and Zufar. However, 'Abū Ḥanīfa ruled that it returns valid if the option is dropped during the three days, since the defective aspect would be dropped prior to rendering the sale defective. Zufar, on the other hand, ruled that a defective contract may never return to validity.

Al-Shāfi'ī, in contrast to what was mentioned in *Tuhfat Al-Fiqahā'*, considered the contract with an option for more than three days invalid. His proof is that the option introduces uncertainty (*gharar*) into the contract, and its allowance for three days or less is an exceptional license (*rukhsah*), which may not be extended. In summary, this opinion is based on the view that options are in contradiction with the prerequisites of sales, and they are allowed only based on the legal authority of the above mentioned *Hadīths*.²⁸

2. Muḥammad, 'Abū Yūsuf and the Ḥanbalīs ruled that it is permissible to stipulate any known option period that is agreed upon by the buyer and seller, no matter how long or short. Their proof is the narration that 'Ibn 'Umar permitted an option for two months.²⁹ They also argued that the option is a right that may be stipulated as a condition, and thus its term may be determined by the one stipulating it, as in the case of determining a deferment term. In other words, the period of an option is appended to the contract, and thus is left to the judgment of the parties of the contract,

²⁷Narrated by 'Abd Al-Razzāq in his *Muṣannaf*. 'Abd Al-Haqq listed it in his *'Aḥkām* based on the narration of 'Abd Al-Razzāq, but found fault with its chain of narration that included 'Abān ibn 'Ayyāsh, saying that his narrations are not accepted despite being a pious man; c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.8).

²⁸Al-Sarakhsī (1st edition (Hanafi), vol.13, p.40 onwards), Al-Kāsānī ((Hanafi), vol.5, p.174), 'Ibn Al-Humām ((Hanafi), vol.5, p.110 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī)), vol.2, p.47).

²⁹Al-Zayla'ī said that this *Hadīth* is "very strange" (*gharībun jiddan*); c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.8).

as in the case of deferment.³⁰

3. The Mālikīs ruled that the period of the option may be as long as necessity dictates. Such necessity varies across objects of sale. Thus, fruits that perish in a day may not be sold with an option of more than a day, clothes and animals may have options for up to three days, and land that cannot be reached in three days or less may be sold with an option for more than three days. They ruled also that a house or similar object would require an option period of one month.

Their proof is that the objective of permitting options is giving the contracting parties enough time to inspect the object of sale. Thus, the period of the option must be restricted in a manner that allows for the inspection of the object, which varies across different objects of sale. They use the text of the *Hadīth* as proof of this general concept: that options are allowed due to the need of the contracting party, and thus its period must be determined by that need. Thus, they classify this text among the specific ones that were intended to convey a general concept (*khāṣṣun 'uriḍa bihi cām*).³¹ This is in contrast to the opinions of the Shāfi'īs, 'Abū Ḥanīfa, and Zufar, who found this text to be a specific one intended to convey a specific purpose (*khāṣṣun 'uriḍa bihi khāṣṣ*). The period of the option begins with the date of the contract

Determination of the option period limit

'Abū Ḥanīfa ruled that if an option is stipulated until tonight or until tomorrow, then the night or tomorrow is included in the option period. In this regard, he argued, the purpose of defining a limit to the time period is to exclude what comes after it from what comes before, as in the verse: "Wash your faces, and your hands (and arms) to the elbows;..." [5:6]; where the elbows are specified as the limit of the area to be washed, and are included in the washing. As further proof, he argues that if the time limit were not mentioned, then the option would be valid for the entire time up to the three day limit, of course.³²

'Abū Yūsuf and Muḥammad, the Mālikīs, the Shāfi'īs, and the Ḥanbalīs ruled that the night or tomorrow, stipulated as the limit of the option, are not included in the option period. The rule that the term *'ila* ("to" or "until") specifies the end of the limit. Thus, the beginning of the stipulated limit is the demarcation between what comes before it and what comes after, as in the verse: "Then complete your fast till the night..." [2:187]; where the fasting is completed as soon as the disk of the sun sinks below the horizon, thus excluding the night from the fasting period. Thus, the term is understood literally, as if

³⁰Ibn Qudāmah (, vol.3, p.585), Marī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.30), Al-Sarakhsī (1st edition (Hanafi), vol.13, p.41), 'Ibn Al-Humām ((Hanafi), vol.5, p.111), Al-Kāsānī ((Hanafi), vol.5, p.174).

³¹Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.207), ḥāshiyat Al-Dusūqī (vol.3, pp.91,95), 'Ibn Juzayy ((Mālikī), p.273).

³²Al-Kāsānī ((Hanafi), vol.5, p.267).

the linguist said: “As soon as you hear this term, understand that the period has reached its end”.³³

5.12.3 Methods of dropping an option

A contract with an option is non-binding, and it becomes binding once the established option is dropped. There are three ways an option may be dropped:

1. Manifest dropping of an option

An option is manifestly dropped if the person holding the option says: “I have dropped this option”, “I have invalidated this option”, “I have agreed to the sale”, etc. In all such cases, the option is no longer valid, whether the buyer knows of the permission or not. This follows since the option was legalized to permit its voiding, thus when it is dropped it becomes invalid, returning the contract to its original state of bindingness and executability.

Moreover, the option is dropped if the person holding the option says: “I have dissolved the contract”, “I have violated the contract”, or “I have voided the contract”. This follows since the option is in essence a choice between dissolving the contract or permitting it, and thus it is dropped if either (dissolution or permission) is established.³⁴

2. Inferred dropping of an option

If the person holding the option takes an action from which the permission of the sale and the establishment of new property rights may be inferred, the dropping of the option is inferred simultaneously from the same action. For instance:

- If the buyer has an option and is in possession of the object of sale, and if he offers the object for re-sale, his option is invalidated. Thus, offering to sell the object to another implies that he chose ownership, which in turn requires invalidating the option.
- If the seller has an option and then offers the object for sale, then the more correct of two opinions narrated on the authority of 'Abū Ḥanīfa is that the option is dropped. This follows since offering the object for sale implies that he chose to keep the object of the original sale.
- Similarly, a buyer's option is dropped if he sells the item that he had purchased, pawned, leased, or given as a gift, whether or not he had delivered the object. All such actions imply ownership of the object, thus necessitating the permission of the original sale.
- If the seller who holds an option undertakes any of the above-mentioned actions with respect to the price of the original sale, his option is dropped.

³³Ibn Qudāmah (, vol.3, p.588), Marṣā ibn Yūsuf (1st printing (Hanbali), vol.2, p.31), Al-Shāfi'ī (Shāfi'ī), vol.2, p.64), Al-Kāsānī ((Hanafi), ibid).

³⁴Al-Kāsānī ((Hanafi), vol.5, pp.267,271).

However, the two cases of the buyer and seller differ with respect to the delivery of a gift or a pawned object. In those two cases, the option held by the seller is not dropped except after delivery, in contrast to the option held by the buyer.³⁵ On the other hand, leases are treated the same for buyers and sellers. In this case, the option is dropped without requiring receipt, since the contract is thus binding, in contrast to pawning and gift prior to receipt, where they are non-binding.

- Another example of inferring the dropping of an option is the case of a buyer allowing people to move into the house he bought, with or without a rent, making repairs or improvements in the house, adding or removing parts of the building, etc. All such actions imply that he has chosen the ownership of the house.
- Similarly, if a buyer water plants, reaps its fruits, uses it as food for his livestock, etc., he has permitted the sale and dropped the option by implication.³⁶
- On the other hand, riding an animal to allow it to drink or to return it to the seller does not drop the option. This is the preferred opinion (based on *istihsān*) since the animal may be impossible to direct without riding it. However, the ruling according to analogy (*qiyās*) is that the option is dropped, based on the argument that riding the animal implies choosing ownership.
- Similarly, riding an animal to test its manner of walking and its strength does not drop the option.
- Another example is wearing a dress to test its size, which does not drop the option. However, wearing it a second time for the same reason drops the option.
- In this respect, riding the animal a second time to test a different feature (ex. running speed, etc.) does not drop the option, whereas riding it a second time for the same purpose as the first test drops it.

However, some of the Hanafī masters ruled that riding an animal for a second time to test the same aspect does not drop the option, since a true test may require more than one trial. Thus, multiple trials may be needed to test the animal's behavior, in contrast to the dress whose attributes can be tested with one trial.³⁷

Options dropped by necessity

We can enumerate five cases where an option may be dropped by necessity:

³⁵ Al-Kāsānī ((Hanafī), vol.5, p.267), Al-Samarqandī ((Hanafī), vol.2, p.95).

³⁶ Al-Samarqandī ((Hanafī), vol.2, p.100 onwards), Al-Kāsānī ((Hanafī), vol.5, p.270).

³⁷ Al-Samarqandī ((Hanafī), vol.2, p.101 onwards), Al-Kāsānī ((Hanafī), vol.5, p.270).

1. Passage of the option period

If the option period elapses without the contract being voided, then the option is dropped. This follows since the option elapses with the elapsing of its period, thus rendering the contract binding.³⁸ This is the opinion of the Shāfi‘īs and Ḥanbalīs. In this respect, they ruled that the option period is appended to the contract, and thus it is voided when the period is ended in the same manner that deferment is voided when the deferment period ends. Thus, extending the option beyond the end of its period would violate the treatment of conditions in contracts. Once the condition (in this case the option for its specified period) is eliminated by the elapsing of its specified period, the contract returns to its original state of bindingness.³⁹

On the other hand, ‘Imām Mālik ruled that the sale does not become binding simply by the elapsing of the option period. Instead, he ruled that a decision must be made at that time. His proof is that the option period was stipulated as a right to the holder of the option, and not an obligation on him. Thus, the passage of time by itself cannot necessitate an outcome for the contract. This is analogous to the passage of time for a contract where the slave has the right to buy his freedom at the end of a specified term. In this case, the passage of that term does not by itself oblige the owner to free the slave.⁴⁰

2. Death of the option holder

If the person holding an option – buyer or seller – dies, the option is dropped and the contract becomes binding since voiding the contract is no longer possible. However, jurists agreed that the defect option (*khiyār al-‘ayb*) and the specification option (*khiyār al-ta‘yīn*) are inherited. On the other hand, they have agreed that the option of permitting the sale of an uncommissioned agent, and the inspection option (*khiyār al-ru‘yah*) are not inherited. Also, deferment is not inherited.⁴¹ The Ḥanafīs and Mālikīs ruled that the acceptance option (*khiyār al-qabūl*) is not inherited.

The Shāfi‘īs ruled that contract session option (*khiyār al-majlis*) is inherited.⁴² Thus, if the option holder dies or faints during the contract session, the option is not invalidated, but rather transferred to his heir or the party taking care of him. The Ḥanbalīs, on the other hand, ruled that this option is voided by death, but not by insanity or fainting.⁴³

As for the inheritance of a conditional option (*khiyār al-shart*), jurists differed:

- The Ḥanafīs ruled that this option is not inherited, and is thus dropped by the death of its holder. In this regard, the heir is entitled only to that

³⁸ Al-Kāsānī ((Hanafi), vol.5, p.267).

³⁹ Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.2, p.64), Ibn Qudāmah (, vol.3, p.591).

⁴⁰ *Hāshiyat Al-Dusūqī* (vol.3, pp.95,98).

⁴¹ Al-Kāsānī ((Hanafi), vol.5, p.268), Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.209).

⁴² Al-‘Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.9. p.196), *Hāshiyat Al-Bājūrī* (vol.1, p.160).

⁴³ Mar‘ī ibn Yūsuf (1st printing (Hanbali), vol.2, p.30).

which is left after the death of the benefactor, and this option does not remain after his death, when he can no longer exercise his choice. This is in contrast to the defect and specification options, where the object of sale is inherited, but the option by itself (without being attached to an object) does not stay after the person's death.⁴⁴

In summary: the acceptance option, the permission option in the sale of an uncommissioned agent, deferment, and the conditional option are not inheritable. However, the defect option, the specification option, retribution (*al-qışāṣ*), the inspection option, the characteristics option, and the deception option are not inheritable.⁴⁵

- The Ḥanbalīs ruled that the conditional option is invalidated once its holder dies. However, an option held by the other party remains valid unless the dead party had exercised his right to void the contract during the option period and prior to his death, in which case the option is transferred to his heirs.⁴⁶
- The Mālikīs and Shāfi‘īs ruled that if an option holder dies, his heirs inherit all of his options. They base this opinion on the argument that options are rights established to guarantee the quality of the buyer's property. Such rights, such as pawning, withholding the object of sale until the price is delivered, and similar financial rights, are not dropped due to death. Thus, all options are transferred to the heir in the same manner that deferment, the defect option, the right to void the sale, and dissolution of a sale by mutual oath are inherited.⁴⁷

We note that the source of disagreement in the inheritance of options is whether rights are inherited in the same manner that properties are. The majority of jurists ruled that rights and properties are inherited in the same manner unless there is a proof in a given case that differentiates the two. The Ḥanafis, on the other hand, endorsed the general ruling is that properties are inheritable but rights are not, unless there is a proof in a given case that makes them similar.

3. States equivalent to death

States that render a person equivalent to dead (e.g. insanity, coma, sleep, intoxication, apostasy, and joining the land of war) are treated similarly to

⁴⁴ Al-Sarakhsī (1st edition (Hanafi), vol.13, p.42), 'Ibn Al-Humām ((Hanafi), vol.5, p.125), Al-Kāsānī ((Hanafi), vol.5, p.268), 'Ibn Ḩābidīn ((Hanafi), vol.4, p.57).

⁴⁵ 'Ibn Ḩābidīn ((Hanafi), vol.5, p.538).

⁴⁶ 'Ibn Qudāmah (, vol.3, p.579), Marṣā ibn Yūsuf (1st printing (Hanbalī), vol.2, p.33).

⁴⁷ 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.209), 'Ibn Juzayy ((Mālikī), p.273), 'Abū-'Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.259), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.45). Dissolution of a sale by mutual oath ensues when the buyer and seller disagree on the amount of the price or object of sale, and where neither of them has a proof of his claim. In this case, if they cannot reach an agreement, a judge solicits an oath from each of them negating the other's claim, and if they swear their oaths, he dissolves the sale; c.f. *Natā'ij Al-'Afkār* (vol.6, p.183 onwards).

death.⁴⁸ Thus, if the option holder becomes insane or faints during the option period, and if the option period passes while he is in that state, the contract becomes binding. In this case, the option holder was incapable of voiding the contract, and thus the benefits of the option are dropped. However, if he returns to consciousness and sanity during the option period, the option remains, since he may exercise the right to permit the contract or to void it.

Similarly, an option is dropped if its holder remains asleep for the duration of the option period. Moreover, the most accepted opinion is that the option is dropped if the person is intoxicated for the duration of the option period.

If the holder of an option reverts from Islam, and was killed or died as an apostate, then the sale becomes binding. The ruling is the same if he joins the “land of war” (*dār al-harb*), and a judge orders him to be chased. In this case, apostasy is [legally] equivalent to death once the person joins the land of war. However, if the apostate were to repent and return to Islam during the option period, the option remains valid.

The above rulings regarding options held by an apostate apply to the case where he does not exercise the option by voiding or permitting the sale. However, if he does take such an action during the option period, we have to consider the circumstances in more detail:

- Jurists agree that if he permits the sale, then it becomes valid.
- If he voids the contract, then 'Abū Ḥanīfa considers the contract suspended: if he reverts to Islam, his exercise of the option to void is accepted; and if he dies or is killed as an apostate, then his exercise of the option is voided [and the sale is concluded].
- 'Abū Yūsuf and Muḥammad, on the other hand, ruled that the dealings of the apostate are executable. Thus, they disagreed with 'Abū Ḥanīfa who ruled that the dealings of an apostate are suspended; whereas they ruled that they are executable regardless of whether he reverts to Islam, dies, or is killed.⁴⁹
- The Shāfi'īs and Ḥanbalīs ruled that if the option holder faints or is muted, then his option is transferred to his guardian (a judge or otherwise).⁵⁰

4. Object of sale perishing

The status of the option and sale in this case requires considering the circumstances in some detail: the perishing may occur before or after receipt; and the option may be held by the buyer or the seller:⁵¹

⁴⁸ Al-Sarakhsī (1st edition (Hanafi), vol.13, p.44), 'Ibn Al-Humām ((Hanafi), vol.5, p.121).

⁴⁹ See the detailed discussion in 'Ibn Al-Humām ((Hanafi), vol.4, p.395 onwards).

⁵⁰ Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.45), Marṣī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.33).

⁵¹ Al-Sarakhsī (1st edition (Hanafi), vol.13, p.44), Al-Kāsānī ((Hanafi), vol.5, p.272), 'Ibn Al-Humām ((Hanafi), vol.5, p.117).

1. If the object of sale perished prior to receipt (i.e. while still in the possession of the seller), the sale is invalid and the option is dropped. This is the legal status of the sale and option regardless of whether the option was held by the buyer, the seller, or both. This opinion follows since the sale would be invalidated due to the impossibility of delivery even if it contained no options. Thus, when an option based on a condition is added, that further reinforces the opinion to invalidate the sale.
2. If the object perished after receipt (i.e. in the possession of the buyer), then:

- (a) If the seller is the option holder, then the sale is invalidated and the option is dropped. In this case, the buyer is liable to compensate the seller by a similar item if it is fungible, or by its value if it is non-fungible.

'Ibn 'Abī Laylā ruled that the perishing of the object of sale in the possession of the buyer is treated the same way as the perishing of an entrusted object ('amāna). His ruling is based on the view that the existence of an option impedes the conclusion of the contract. Thus, the object's compensation if it perishes is legally equivalent to the compensation for an entrusted object.

The more correct opinion, however, is that shared by the majority of jurists. This follows since the buyer was in receipt of the object of sale based on the rules of the sale, despite the fact that the sale itself was never concluded as a contract. Thus, the compensation for the perishing object in such a sale cannot have a lower legal status than the compensation for an object that is held by the buyer after bargaining.⁵² In the latter case, there is no contract to start with, whereas in the former there is at least a contract, and therefore the compensation is necessary in this case.

- (b) If the buyer were the option holder, and if the object of sale perishes due to the actions of the buyer, the seller, or a natural cause, then the sale is not invalidated, the option is not dropped, and the sale is binding. In this case, it perishes in the property of the buyer, and its compensation is its price, which the buyer no longer needs to pay. In this case, despite the fact that the buyer does not own the object in the opinion of 'Abū Ḥanīfa, is unable to return the object of sale since it has a new defect that ensued after it left the possession of the seller. Thus, since the object of sale may not be returned to the seller, the option is rendered useless, and the sale becomes binding. In this regard, the contract is concluded, and the object perishes in compensation for its price.

⁵²An item thus received by the potential buyer (*al-maqbūd 'alā sawmi al-shirā'*) is an object held by the buyer as if he were going to buy it at a price named by the two parties, with the intention of pondering whether to keep it for the named price. In such a case, if the object perishes in the potential buyer's possession, he is liable to compensate the seller for its value; c.f. 'Ibn 'Abī Ḥanīfa (Hanafi), vol.4, p.52).

The Shāfi‘īs agree with the Hanafi ruling in the case of perishing caused by natural events prior to receipt, in which case the sale is voided and the option is dropped. They also agree that the contract is voided and the option is dropped if the perishing occurs after receipt of the object of sale by the buyer. In the latter case, the buyer is liable to compensate the seller for the value of the merchandise if the seller held the option.

If the buyer was the option holder, the Shāfi‘īs ruled that he is liable for the value of the merchandise. This follows since voiding the sale is problematic due to the impossibility of returning the object of sale. Thus, if the buyer exercises his option, he is liable to pay the seller the value of the merchandise. Moreover, if he does not exercise the option, thus permitting the sale, then the object perished in his property, and he is liable to pay the seller its value.⁵³

The Mālikīs ruled that if the object of sale perishes in the possession of the seller, then – in all cases – he is liable for the object, and the sale is voided. However, if the object perishes while it is in the possession of the buyer, then its legal status is equivalent to that of a pawned or loaned object:

- If the object of sale was possible to hide (e.g. clothes or jewelry), then the buyer must pay the seller the greater of its price and its value. In this case, the seller had the right to conclude the sale if the price was greater than the value, or voiding it if the value was larger than the price. However, if there is a verifiable proof that the object of sale perished, then the buyer is not liable.
- If the object of sale cannot be hidden (e.g. houses, real estate, etc.), then the seller is liable for it. If the seller contests the buyer's claim that the object did not perish out of his own negligence, then the buyer's oath would render the seller liable for the object, unless there is a verifiable proof that the buyer lied.⁵⁴

The Hanbalīs ruled that if the object of sale perished during the option period prior to receipt, and if it is fungible (measured by weight or volume), the sale is voided. In this case, the seller is liable for the object, and the buyer's option is invalid. However, if the object were non-fungible, and if the seller did not prevent the buyer from receiving it, the most common ruling in the school is that it becomes the buyer's liability, as if it perished after receipt.

However, if the object of sale perished after receipt but during the option period, then it is automatically the liability of the buyer, and his option is invalid. If the buyer had an option, then there are two opinions in the school:

1. The seller's option is invalidated, by analogy to the option of returning a defective item. This is the opinion of Al-Khirqiy and 'Abū Bakr.

⁵³ Abū-'Ishāq Al-Shirāzi ((Shāfi‘ī)), vol.1, p.260).

⁵⁴ Ibn Rushd Al-Hafid ((Mālikī)), vol.2, p.208), *Hāshiyat Al-Dusūqī* (vol.3, p.104 onwards). Note that 'Ibn Rushd Al-Hafid ((Mālikī)) rendered the seller unconditionally liable for the object, ruling that the buyer is entrusted with the object, regardless of whether both parties or only one party holds an option.

2. The seller's option is not voided, and he has the option to void the sale and requiring compensation for its value from the buyer.⁵⁵

5. New object of sale defects

In this case, we must distinguish between the cases where the option holder is the buyer or the seller:

1. If the buyer holds the option, then his option is dropped if the object of sale becomes defective because of a natural event or the actions of the seller. This is the case regardless of whether the buyer or the seller is in possession of the object of sale. This follows since a portion of the object of sale thus perished without compensation. In this case, the seller is not liable to the buyer for the part of the object that perished, since it is his property. The sale is thus voided for the part that perished, and may not remain in effect for the other part, since that would constitute partitioning the contract with the buyer after the contract was concluded. The latter, as we know, is not valid.
 - If the ensuing defect was caused by actions of the buyer, or a third party, then the sale is not voided. The seller thus retains his option, since he may permit the sale for the object of sale even after its diminution. In this case, the diminution in the object of sale is compensated for by the liability of the buyer or the third party, who caused a defect in another's property without permission. Thus, the value of the diminution is implicitly calculated.
 - If the seller retains his option thus while the object of sale is in the possession of the buyer, then he may either permit the contract or void it. If he permits the sale, then the buyer must pay the entire price, since the sale is valid for the entire object of sale. In this case, the buyer does not have the option of returning the object of sale based on its change, since this change happened while the object was in his possession, and thus while he was liable for it.
 - The difference in the two cases where the defect was caused by the buyer himself or by a third party is that in the former case he is personally liable for his losses. However, if the defect was caused by a third party, then the buyer has the option of imposing a fine (indemnity, *'arsh*) since the object becomes his, and thus the damage caused by the third party was a transgression on his property.

On the other hand, if the seller voids the sale, we must consider the following cases:

- If the defect was caused by the actions of the buyer, then the seller may take the remainder of the object and collects the indemnity

⁵⁵Ibn Qudāmah (, vol.3, p.569).

(‘arsh) from the buyer. In this case, the buyer was liable for the value of the object of sale, and is thus liable to compensate the seller for the part that he ruined.

- If the defect was caused by a third party, then the seller has the option of demanding compensation from the perpetrator, or demanding it from the buyer. The first demand is valid since the infraction affected his property, and the second demand is valid since the infraction occurred while the object was in the possession of the buyer.
 - If the seller decides to demand compensation from the third party who caused the defect, then that party is liable for paying the indemnity. If he demands compensation from the buyer, then by paying the compensation, the buyer may in turn demand compensation from the perpetrator. Thus, the buyer takes the right originally belonging to the seller to collect compensation for the harmed object, even though he never took over the property rights for the object.
2. If the buyer holds the option, then his option is dropped once the object becomes defective. The sale, thus, is not voided, regardless of the cause of the defect, be it an action by the buyer, the seller, a third party, or nature. In the cases of defects caused by nature or the seller, the object of sale was affected while it was in the possession of the buyer, and thus he is liable to return its value. In the cases of defects caused by the actions of the buyer or a third party, since the object of sale may not be returned in full, and since the buyer may not validly partition the sale contract with the seller, he must return the value of the object.⁵⁶

Thus, if the defect occurred while the object was in the possession of the buyer (e.g. if a wall in a house falls without being caused by anyone’s actions), the option is dropped based on this diminution. This follows since returning the object of sale as it was received becomes impossible. Thus, the buyer is liable for the entire price since the diminution occurred while he was liable for the object.

5.12.4 Status of a contract during its option period

The Ḥanafis ruled that a sale with a stipulated option condition is not concluded instantly in terms of its legal purpose of transferring ownership. Instead, they ruled that such a sale is suspended until the option is dropped either by permitting the sale or by voiding it. Then, if the holder of the option permits the sale, it is considered concluded at its inception, i.e. prior to the permission, provided it satisfied all other conditions of conclusion. On the other hand, if

⁵⁶ Al-Samarqandī ((Ḥanafī), vol.2, pp.106-109), ‘Ibn Al-Humām ((Ḥanafī), vol.5, p.117 onwards), Al-Kāṣānī ((Ḥanafī), vol.5, pp.269,272). Notice the difference between this opinion and that of Al-Kāṣānī who considered the option to remain if the defect was due to natural causes and occurred while the object was in the possession of the seller.

the holder of the option voids the sale, it remains unconcluded. This issue is discussed in more detail in what follows.⁵⁷

- If both parties to the contract have the option, the contract is not concluded in terms of its legal purpose for both of them. In other words, the object of sale does not leave the ownership of the seller or enter the ownership of the buyer; and the price does not leave the ownership of the buyer or enter the ownership of the seller. In this case, the option that prevents conclusion in terms of legal status applies to both the buyer and the seller.
- If the seller alone has an option, the contract is not concluded on his part in terms of its legal purpose. Thus, the object of sale remains in his ownership. However, the price is no longer owned by the buyer, since the contract is binding on him. On the other hand, 'Abū Ḥanīfa ruled that the price is not considered owned by the seller either so that the two compensations (object of sale and price) will not both be in the possession of one person. Such a biased holding of the two compensations is not allowed in commutative contracts for which equality between the buyer and the seller is a prerequisite.

'Abū Yūsuf and Muḥammad, however, ruled that the price becomes the property of the seller, and it is his right to collect it since the sale is binding on the buyer who did not stipulate an option for himself. Their proof is that it is not permissible for an item (in the case, the price) to be without an owner. Thus, 'Abū Ḥanīfa considers the contract unconcluded in both compensations (object of sale and price), while 'Abū Yūsuf and Muḥammad ruled that it is only unconcluded for the object owed by the option holder.

- If the buyer is the sole option holder, the sale is not concluded on his side of the contract. Thus, the price remains his property. On the other hand, the object of sale is no longer the property of the seller, who can not sell it to another. The object of sale in this case is not considered the property of either party in the opinion of 'Abū Ḥanīfa and is considered the property of the buyer for 'Abū Yūsuf and Muḥammad; in analogy to the previous case.

This disagreement between 'Abū Ḥanīfa and his two colleagues 'Abū Yūsuf and Muḥammad leads to the following conclusions:

1. If a Jew or Christian buys wine or pork from another Jew or Christian with a stipulated option, and if the buyer receives the object of sale and then embraces Islam, the sale is invalidated in the opinion of 'Abū Ḥanīfa. In this case, his ruling is that the object of sale was never the property of

⁵⁷ Al-Kāsānī ((Hanafī), vol.5, p.264 onwards), Al-Kāsānī ((Hanafī), vol.5, p.115 onwards), 'Ibn 'Abidīn ((Hanafī), vol.4, p.51 onwards).

the buyer during the option period, and once he becomes a Muslim, he is forbidden from owning wine or pork.

For 'Abū Yūsuf and Muḥammad, on the other hand, the sale is not invalid. Their ruling is that the option is dropped and the sale is binding, since the buyer owned the object of sale during the option period as a Jew or Christian. Once he embraces Islam, however, he does not have the right to return the forbidden object of sale, thus voiding the option.

On the other hand, if the seller embraces Islam while the buyer held the option, the sale is not invalidated, and the three scholars agree that the buyer retains his option, while the sale is binding on the seller. In this case, if the buyer permits the sale, it becomes binding. If he voids the sale, the object remains the property of the seller. In this regard, note that it is legally permissible for a Muslim to own wine or pigs, for instance if a Jew or Christian embraces Islam while owning wine or pigs.

However, if the seller is the option holder and he embraces Islam during the option period, the option and the contract are both invalidated. This follows since all three scholars agree that the option prevents the object of sale from leaving his property. Once he embraces Islam, he is forbidden from transferring the ownership of wine and other forbidden items. On the other hand, if the buyer is the one who embraces Islam, the contract is not invalidated, and the seller retains his option. In this latter case, the contract is binding on the buyer, who may own the forbidden items – as discussed above – if the seller permits the sale. Of course, if the seller then voids the contract, he retains ownership of the object of sale.

2. If the object of sale is a house, and if the seller holds an option, the three scholars agree that preemption is not permissible, since the seller's option retains the object of sale in his property.

If the buyer held the option, then the three scholars agree that preemption is valid, since – as 'Abū Ḥanīfa ruled – the buyer's option removes the object from the property of the seller while preventing it from becoming the property of the buyer. In this case the right of preemption is established once the seller's ownership is removed. 'Abū Yūsuf and Muḥammad, on the other hand, ruled that the buyer's option does not prevent him from owning the object of sale, thus establishing the right of preemption.⁵⁸

The preceding was a detailed account of the Hanafī opinions. The opinions of the non-Hanafī schools are as follows:

- The Mālikī opinion, and one account of the opinion of 'Ahmad, is that the seller retains ownership of the object of sale for the duration of the option period. Permission of the sale would result in the transfer of the object of sale from the property of the seller to the property of the buyer, but does not establish permanent ownership. Their proof is that the object of sale

⁵⁸Ibn Al-Humām ((Hanafī), vol.5, p.133), Al-Samarqandī ((Hanafī), vol.2, p.113).

is the property of the seller, while the buyer's ownership is not final since he may return the object. Based on this ruling, the produce of an object of sale during the option period is considered the property of the seller.⁵⁹

- The more prominent Shāfi‘ī opinion is as follows:
 - If the seller holds the option, then the ownership of the object of sale and all its appertainings (e.g. milk, offspring, fruits, etc.) are for him. However, if the buyer holds the option, then the ownership is his. Thus, if only one party holds the option, then that party alone has the right to deal in the object of sale, which renders it that party's property.
 - However, if both parties hold an option, then ownership of the object of sale is suspended. In this case, neither party has a stronger legal claim on the object of sale, and thus its ownership is suspended. Then, if the sale is concluded, the buyer is considered the owner from the inception of the sale; otherwise the seller is considered to be the continuous owner, as though the object never left his property.
- The most common Hanbālī opinion is that ownership is transferred to the buyer at the time of the contract, regardless of whether an option is held by one or both parties. Their proof is the Ḥadīth of the Prophet (pbuh): “Whoever sells a slave who has some property, that property belongs to the seller; unless the buyer stipulated [the transfer of its ownership] as a condition”, as well as the Ḥadīth: “Whoever sells a palm tree after it has been pollinated, the dates belong to the seller unless the buyer made it a condition that they are his”.⁶⁰

Thus, the Messenger of Allah (pbuh) rendered the object of sale the property of the buyer simply by the latter's stipulation of the condition. This applies generally to all sales. Thus, every valid sale results in the transfer of ownership regardless of whether or not a condition is stipulated. In this regard, a sale is a transfer of ownership, the proof being the use of the phrase: “I have made this your property”.⁶¹

This difference in opinions among jurists results in differences among the schools over the legal status of delivery of the price or the right of the seller to receiving it. For instance, the Hanbalīs ruled that the delivery of the price is binding if the buyer holds the option, while it is not binding if the seller or both parties hold the option.

⁵⁹ *Hāshiyat Al-Dusūqī* (vol.5, p.133), 'Ibn Juzayy ((Mālikī), vol.2, p.113).

⁶⁰ Narrated in *Al-Muwatta'* and the major books of Ḥadīth on the authority of 'Ibn 'Umar, and it has other narrations; c.f, Al-Ḥafīz Al-Zayla‘ī (1st edition, (Ḥadīth), vol.4, p.5), 'Ibn Al-'Athīr Al-Jazarī (, vol.2, p.34 onwards).

⁶¹ 'Ibn Qudāmah (, vol.3, p.571), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.32), 'Ibn Rajab (1st edition (Hanbalī), p.377).

5.12.5 Means of voiding or permission

Voiding and permission may ensue voluntarily or involuntarily:⁶²

- Involuntary voiding or permission is valid even if the other party is not present or is not aware of the actions of the one holding the option. Examples include the termination of the option period, and the perishing of the object of sale or its diminution, as mentioned above.
- The Ḥanafi jurists agreed that the option holder has the right to permit the sale voluntarily without the knowledge of the other party of the sale. This follows since the second party has expressed his consent of the sale, and the suspension of the executability of the contract is conditional solely on the permission of the option holder. However, the permission must be uttered verbally, as in saying: “I have permitted this sale” or “I have accepted this sale”, rather than simply be determined in thought. This is the case since legal rulings pertain to manifest actions and utterances that serve as proof of intentions and thoughts.
- Voiding also requires verbal manifestation.⁶³ If the option-holder voids the contract verbally, and if the other party knows of that voiding, then the Ḥanafi jurists agree that the voiding is valid, whether or not the other party approves of it. However, if the other party did not know of the voiding, then it is not valid in the opinion of ’Abū Ḥanīfa and Muhammad, whether the option-holder is the buyer or the seller. In this case, the voiding is suspended: if the other party knows of it during the option period, it is executed; but if the option period elapses without the second party’s knowledge of the voiding, the contract becomes binding.

This follows since voiding a contract is dealing in the legal right of another, which necessitates the knowledge of both parties who have rights pertaining to that contract. For instance, if the seller held the option, the buyer might have dealt in the object after the passage of the option period – assuming that the sale is executed. In that case, he would be liable to pay the seller the value of the commodity, which may exceed the price, thus leading to harm. On the other hand, if the buyer held the option, the seller may refrain from seeking other buyers based on the assumption that the sale is concluded. This too may lead to harm and loss.

’Abū Yūsuf ruled that if the seller held the option, then it is not a condition that the buyer should know of the voiding. However, if the buyer held the option, he ruled, it is necessary for the seller to know of the voiding for it to be valid. Another narration on his opinion states that he ruled that knowledge of the other party is not necessary in any case. This second

⁶²Ibn Al-Humām ((Hanafi), vol.5, p.120).

⁶³Note that both permission and voiding may be by words or actions. For instance, if a buyer holding an option deals in the object of sale in a manner that implies ownership (e.g. pawning, renting, offering for sale, etc.), that is a permission of the sale. Those same actions, if taken by a seller with an option, would constitute voiding the sale.

opinion is based on the view that the one who voids the contract has the right to do so, and the other has no right to stop the voiding. Thus, the voiding would not be suspended according to this opinion, in analogy to the sale of a commissioned agent, which is valid regardless of whether or not the one who commissioned him is aware of the sale.⁶⁴

This difference in opinion pertains to the inspection option (*khiyār al-rū'yah*). As for the defect option, the Ḥanafī jurists agreed that voiding requires the knowledge of the seller.⁶⁵

- If two individuals hold an option jointly (be it a conditional option, an inspection option, or a defect option) then neither one of them can unilaterally void the contract. This is the opinion of 'Abū Ḥanīfa, and he based it on the view that the object of sale exited the property of the seller without the defect of joint rights. However, if one of them returns it to the seller's ownership, it can only be returned with that defect, thus causing loss and harm.

'Abū Yūsuf and Muḥammad agreed, ruling that it is valid for one of the two option-holders in this case to void the sale unilaterally. In this case, each of them has an established option, which is not dropped based on the other party's dropping of his option. If that were the case, the first party's right would not be respected.⁶⁶

Thus, 'Abū Ḥanīfa ruled that it is valid for the two parties to agree on permitting or voiding. However, if one of them permits and the other voids, then the above mentioned disagreement needs to be resolved. Similarly, a dispute needs to be resolved if they choose to return half of the object of sale and permitting the other half.

The above was a detailed discussion of the means of voiding and permission in the Ḥanafī school. The non-Ḥanafī jurists disagreed with their opinion thus: The Mālikīs, Shāfi'iis, and Ḥambalīs ruled that it is valid for an option holder to void a sale in the presence or absence of the other party. They base their ruling on the view that the other party's permission of an option is an implicit permission to void the contract whenever the first party wishes. Thus, the second party's presence or knowledge is not a prerequisite for the validity of the voiding. Moreover, since voiding is a breakage of a contract, it does not require the consent of the second party, and thus does not require his presence, in analogy to divorce.⁶⁷

⁶⁴ Al-Kāsānī ((Hanafī), vol.5, p.273), Al-Kāsānī ((Hanafī), vol.5, p.122), 'Ibn Ḩābīdīn ((Hanafī), vol.4, p.57).

⁶⁵ Al-Kāsānī ((Hanafī), ibid).

⁶⁶ Al-Sarakhsī (1st edition (Hanafī), vol.13, p.50), Al-Kāsānī ((Hanafī), vol.5, p.268).

⁶⁷ 'Ibn Qudāmah (, vol.3, p.591), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.49), Al-Shā'arānī ((Shāfi'i), vol.2, p.64).

5.13 Defect option (*khiyār al-^cayb*)

There is proof that this option may be established if stipulated as a contract condition. Thus, I discuss it following the section on the conditional option. The defect option will be discussed in six subsection:

1. The legality and legal status of the defect option.
2. Defects that result in an option.
3. Means of establishing the existence of a defect, and the conditions for establishing the option.
4. Consequences of the option, and the methods of returning defective merchandise.
5. Impediments to returning defective merchandise, and dropping the defect option.
6. Differences among jurists regarding the condition that the seller is not liable for defects.

5.13.1 Option legality and contract status

Legality of the defect option

The legality of this option is founded on a number of *Hadīths*, among which is the narration that the Prophet (pbuh) said: “A Muslim is a brother to other Muslims. It is not permissible for a Muslim to sell a defective item to his brother without showing it to him”.⁶⁸ A second relevant *Hadīth* is: “It is not permissible for a person to sell any item without showing its defects, and it is not permissible for a third party who knows the defect not to identify it”.⁶⁹ A third relevant *Hadīth* is: “Whoever deceives us is not one of us”.⁷⁰

Al-Kāṣānī stated that the foundation for the legality of the defect option is the narration that the Messenger of Allāh (pbuh) said: “Whoever buys a sheep with an udder full of milk, and later discovers that its udder was tied to force the milk to accumulate, then he has a choice of one of two actions for three days”. In another narration: “He has a choice of one of two actions for three days: if he wishes, he may keep it, and if he wishes he may return it and a

⁶⁸Narrated by 'Ahmad, 'Ibn Mājah, Al-Dāraqutnī, Al-Hākim, and Al-Tabarānī on the authority of 'Uqbah ibn 'Āmir. It narration is identified in *Al-Fath* as a good one; c.f. Al-Haythamī (, vol.4, p.80), Al-Shawkānī (, vol.5, p.211). It was narrated by Al-Bukhārī with a different wording; c.f. 'Ibn Al-'Athīr Al-Jazārī (, vol.1, p.420).

⁶⁹Narrated by 'Ahmad, 'Ibn Mājah, and Al-Hākim in *Al-Mustadrak*. In Al-Shawkānī (), two individuals in its chain of narration are named: 'Ahmad 'Abū Ja'far Al-Rāzī and 'Abū Sibā'; the first being subject to debate, and the second being unknown.

⁷⁰c.f. Al-Shawkānī (, vol.5, p.211 onwards). Narrated by Muslim, 'Abū Dāwūd, Al-Tirmidhī, 'Ibn Mājah, and 'Ahmad on the authority of 'Abū Hurayrah. The narration of 'Abū Dāwūd is: “Whoever deceives is not one of us”; c.f. 'Ibn Al-'Athīr Al-Jazārī (, vol.1, p.419 onwards), Al-Haythamī (, vol.4, p.78), Al-Shawkānī (, vol.5, p.212).

container of dates".⁷¹ Thus, the two potential actions that are mentioned here are keeping the merchandise or returning it. The mention of three days in the *Hadīth* is not meant to restrict the time; rather it is based on common practice. The container of dates is intended to compensate the seller for the milk that the buyer obtained.

Note that the majority of jurists consider forcing milk to accumulate in the udders of camels and sheep to be deception regarding characteristics of the object of sale. This type of deception requires giving the deceived an option to invalidate the contract. This is true even if there is no grave injustice involved in the contract, since this option is among the characteristics options.⁷² The jurists thus establish the buyer's option to keep the object of sale or to return it with a container of dates. 'Abū Yūsuf agrees with the majority of jurists in this opinion, while 'Abū Ḥanīfa and Muhammad ruled that the buyer may return the diminished object of sale alone if he wishes.

Legal status of the sale

The legal status of the sale of a defective item is the immediate establishment of its ownership by the buyer, since the cornerstones of sale are unconditional. However, what is established is the condition of the object of sale being void of defects. Then if the object is defective, the contract is affected in its bindingness, not in its fundamental legal status. This distinguishes this type of option from the conditional option, since an option that is explicitly stipulated in the contract fundamentally affects the contract's legal status, preventing the conclusion of the contract from taking place during the option period.⁷³

Therefore, the legal status of the sale of a defective item is: concluded, resulting in ownership by the buyer, but not binding. This follows since the quality of the two compensations in a commutative contract is commonly required. Thus, the acceptability of the quality of the merchandise is an implicit and inferred condition of the contract. Such implicit and inferred conditions are equivalent to those that are explicitly stated from the point of view of bindingness, thus giving the buyer the option and rendering the contract non-binding.⁷⁴

5.13.2 Defects that result in an option

A defect in merchandise is defined as any attribute that is not normally part of the goods, and that would result in a substantial or minor reduction in price

⁷¹ See for comparison Al-Shawkānī (, vol.5, p.214), 'Ibn Al-'Athīr Al-Jazarī (, vol.1, p.420 onwards), Al-Haythamī (, vol.4, p.108), and *Al-Muwatṭa'* (vol.2, p.170). There are multiple narrations of this *Hadīth* by Al-Bukhārī, Muslim, 'Alīmad, *Al-Muwatṭa'*, and '*Aṣḥāb Al-Sunan Al-'Arba'a* on the authority of 'Abū Hurayra. It seems to me that the narration listed above is synthesized from multiple narrations.

⁷² See 'Ibn c-Ābidīn ((Hanafī), vol.4, p.47), and Professor Muṣṭafā Al-Zarqā's *Al-Madkhal Al-Fiqhī Al-^cĀm* (Seventh printing, vol.1, p.374).

⁷³ Al-Kāsānī ((Hanafī), vol.5, p.273).

⁷⁴ Al-Kāsānī ((Hanafī), vol.5, p.274).

in conventional trading (e.g. blindness, one-eyedness, or cross-eyedness in animals).⁷⁵ This is the Hanafi definition of a defect.

The Shāfi‘īs, on the other hand, define a defect as any uncommon attribute that constitutes a diminution in the item itself or its value, or prevents a valid use of the object. They ruled based on the last restriction that the cutting of an extra finger or a small part of the thigh or leg does not permit returning the object of sale if it does not constitute a major scar or prevent a use of the animal.⁷⁶ An example of diminished value is a riding animal that resists being mounted, and an example of prevention of a valid usage is the cutting of part of the ear of a sheep purchased with the intention of ritual sacrifice. In such cases, the buyer has the option of returning the animal.

Thus, the Hanafi definition is purely materialistic, while the Shāfi‘ī definition has an idiosyncratic component depending on the usage a buyer intended for the object of sale. We can now identify two categories of defects: (1) those that result in diminution of part of the object of sale, or an otherwise manifested change in its nature; and (2) those that result in a non-manifested diminution in the object of sale.

Examples of the first category abound: blindness, one-eyedness, cross-eyedness, infirmity, hairlessness, chronic illnesses, missing fingers, black teeth, missing teeth, extra teeth, black finger nails, deafness, dumbness, ulcers, scars, fever, and other physical illnesses.⁷⁷ Examples of the second include a riding animal's aversion to being mounted, unusual slowness in its movement, etc.⁷⁸

5.13.3 Finding a defect, and establishing an option

Conditions for establishing a defect option:

The conditions for the establishment of a defect option are:⁷⁹

1. A defect that ensues during the sale session or afterwards but before receipt of both price and object of sale by the seller and buyer, respectively.
2. A defect that ensues after the buyer receives the object. In this regard, it is not sufficient to consider only defects that were found while the object was in the possession of the seller, as all jurists agree on the right to return defective merchandise.
3. The buyer's ignorance of the existence of a defect at the times of the contract and receipt. However, if he was aware of the defect at either

⁷⁵ Ibn Al-Humām ((Hanafi), vol.5, pp.151,153), Al-Kāsānī ((Hanafi), vol.5, p.274), 'Ibn c-Ābidīn ((Hanafi), vol.4, p.74), Al-Dardīr ((Mālikī)B, vol.3, p.152 onwards).

⁷⁶ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.51). The Ḥanbalīs defined a defect as a reduction in the actual object of sale, e.g. the cut of a finger, even if it results in an increase in the animal's value; or any attribute that commonly reduces its value (e.g. sickness, etc.); c.f. Mar‘ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.35).

⁷⁷ Al-Kāsānī ((Hanafi), vol.5, p.274).

⁷⁸ Al-Kāsānī ((Hanafi), vol.5, pp.274-276), 'Ibn Al-Humām ((Hanafi), vol.5, p.154-155 onwards), 'Ibn c-Ābidīn ((Hanafi), vol.4, p.78).

⁷⁹ Al-Kāsānī ((Hanafi), vol.5, p.275 onwards), Al-Kāsānī ((Hanafi), vol.5, p.153).

- time, then there is no option, since he would have implicitly accepted it.
4. The absence of a condition in the contract that the object of sale be free of defects. However, if the condition is stipulated, then the buyer has no option, since he would be dropping his right by declaring that the object is indeed free of defects.
 5. That it is customary for similar merchandise to be free of similar defects.
 6. That the defect is not removed prior to voiding the contract.
 7. That the defect is not a minor one that can be removed effortlessly (e.g. pollution of a washable dress).⁸⁰

Means of establishing the existence of a defect

The means of establishing the existence of a defect depends on the type of defect, of which there are four:

1. An observable defect, such as an extra or a missing finger, a missing tooth, blindness, one-eyedness, etc.
2. An unobservable defect, which only a physician may detect.
3. A defect that may only be inspected by women.
4. A defect that requires experimentation and testing to discover.

The means of establishing the existence of each type of defect are then as follows:

1. In the case of observable defects, the judge need not require the buyer to provide proof that there is a defect, since the latter would be obvious. Thus, the buyer may sue the seller, and the judge can make a direct decision without need of further proof.

If the defect is not customary in the relevant category of merchandise (e.g. an extra finger, etc.), the object of sale is returned to the seller. In this case, it is not necessary that the buyer prove that the defect ensued while the object was in the seller's possession, since that is obvious. The seller's only recourse, thus, is to claim that the buyer knew of the defect and accepted it. If the seller can provide proof to that effect, the judge should rule accordingly. If he cannot provide such a proof, the buyer is required to take an oath that he did not know of the defect and/or did not accept it. If he refuses to take the oath, the object is not returned; but if he does, then it is returned to the seller.

If, on the other hand, the defect is one that may have occurred while the object was in the buyer's possession, then the judge must inquire from the

⁸⁰tr.: the text contains an item 8 that is identical to item 4. Also, items 1 and 2 in the text seem to be contradictory, and have been adjusted in the translation to maintain consistency.

seller: “did this defect occur while you were in possession of the object?”. If the seller answers in the affirmative, then the object is returned to him, unless he claims that the buyer knew of it and accepted it. However, if he answers in the negative, then the onus of the proof that the defect occurred in the seller’s possession is on the buyer. If the buyer can produce such a proof, then the object is returned to the seller unless the latter claims that the buyer knew of it and accepted it. However, if the buyer has no such proof, he may require the seller to swear an oath that he sold the item and delivered it without the defect in question. In this final case, the seller’s oath must be unequivocal (e.g. “I sold him this item and delivered it without this defect”), and simply denying knowledge in this case would not suffice. If this is the case , the buyer’s claim, if accepted, would require the seller to take back the merchandise, and thus denying it requires an oath. The ruling, thus, is that he must affirm that the defect did not exist at the time of sale or at the time of delivery. This combination is precautionary since the defect can ensue during the period sale and delivery. This is the opinion of Muḥammad.

Other jurists disagreed with this analysis, saying that no precaution is taken by requiring this format for the seller’s oath. They argue that the language of this oath denies the existence of the defect at both the sale and delivery times. Interpreted thus, the seller can be truthful in his oath if the defect ensued during the period between the conclusion of the sale and the delivery of the merchandise. They require a more legalistic language such as an swearing by Allāh that “the buyer does not have the right to return this object based on this defect that he claims”. Others required swearing by Allāh that “I delivered this item to him free of this defect that he claims”. Al-Kāṣānī ruled that such language is valid, since it covers the case of a defect that ensued after the conclusion of the sale but prior to delivery. Some jurists chose to solve the problem by adding to the language of the oath mentioned by Muḥammad, making it more precise: “I sold him this item and delivered it to him free of this defect; it was free of the defect at the times of the sale and delivery”.⁸¹

In such cases, if the seller takes the oath, then he is not obliged to take back the merchandise. However, if he refuses to take the oath, then the contract is voided and the merchandise is returned to him, unless the seller then claims that the buyer knew of the defect and accepted it.

2. If the defect was an unobservable one that only specialists (e.g. physicians and veterinaries) can detect (e.g. a disease of the liver or spleen), then a legal challenge may be brought to a judge based on the testimony of two Muslim men, or one Muslim man with an honorable record. In this case, the judge would ask the seller: “did the defect in question ensue in your possession?”. If he affirms, then the merchandise is returned to him,

⁸¹ Al-Kāṣānī ((Hanafi), vol.5, p.279 onwards), Al-Samarqandī ((Hanafi), vol.2, p.139), 'Ibn cĀbidīn ((Hanafi), vol.4, p.92), Al-Tahāwī ((Hanafi), p.80 onwards).

and if he denies, the buyer needs to provide proof. If the buyer could not provide proof of his claim, then he may require the seller to take an oath, as discussed in the previous item. In this case, if the seller takes the oath, then the object is not returned to him, and it is returned if he refuses to take the oath.⁸²

3. If the defect is one that only women may observe, then the judge must rely on the testimony of women. In this case, he lets one honorable woman, or two to be safer, to inspect the defect and give testimony, based on the verse: “if you realize this not, ask of those who possess [knowledge]” [21:7]. In such cases where men are not allowed to inspect the item in question, a woman’s testimony is legal proof, in analogy to a midwife’s testimony on maternity. While one woman’s testimony suffices, it is better to have the testimony of two.

If the woman in question testifies that the defect is indeed there, then there are two narrations each on the opinions of 'Abū Yūsuf and Muḥammad:

- The two narrated opinions of 'Abū Yūsuf are as follows:
 - In one narration, he distinguishes between the two cases where the object of sale is in the possession of the seller or the buyer. If it is in the possession of the seller, then her testimony is sufficient to establish the existence of the defect, and the sale is voided. However, if the object were in the possession of the buyer, then her testimony establishes the buyer’s right to a legal dispute. In this case, the woman/women’s testimony is not sufficient to establish the buyer’s right to return the object to the seller. The judge would then ask the seller: “did this defect occur while the object was in your possession”, ... and proceed in the same manner outlined in the case of unobservable defects.
 - The other narration on the opinion of 'Abū Yūsuf bases his ruling on the commonality of the defect in question. Thus, if the defect is uncommon in similar merchandise, the sale is voided by the testimony of the woman/women. In this case, the existence of a defect is established by the women’s testimony, and the uncommon nature of the defect is sufficient to be certain that the defect must have occurred in the seller’s possession. On the other hand, if the defect was a common one, the women’s testimony is not sufficient to warrant voiding the contract, since other parties’ knowledge and assertions come to bear on the legitimacy of the buyer’s claim.
- The two narrations on the opinion of Muḥammad are as follows:
 - The first narrated ruling is that the sale is never voided based solely on the testimony of the women.

⁸²Al-Kāsānī ((Hanafi), vol.5, p.278), 'Ibn 'Abidīn ((Hanafi), vol.4, p.92).

- The second narrated ruling is that the sale may be voided before or after receipt based on the women's testimony. This second ruling is based on the view that women's testimony is tantamount to a proof in matters that may not be inspected by men, in analogy to matters relating to maternity.

In summary, the testimony of one or two women is sufficient to establish the existence of a defect that may not be inspected by men. This provides sufficient justification for a legal dispute, but is not sufficient to establish the buyer's right to return the merchandise, regardless of whether the defect ensued before or after the buyer's receipt of the object. This is the most apparent ruling according to the three major Ḥanafī jurists, and thus becomes the school's doctrine.⁸³

4. Establishing the existence of a defect that is not observable at the time of legal dispute, and that may only be detected by usage and experimentation, requires the testimony of two men or a man and two women. Such defects include a tendency to escape, insanity, theft, and bed-wetting. In such cases, if the buyer establishes that the defect exists in the object of sale while in his possession, then the judge should ask the seller: "did this defect manifest itself in your possession?". If the seller answers in the affirmative, then he must take back the merchandise, unless he claims that the buyer knew of the defect and accepted it. If he denies that he had observed this defect, then the buyer is required to provide proof. If the buyer can provide proof that this defect existed in the seller's possession, then it is returned. If the buyer has no such proof, he may require the seller to take an oath that he had never observed this defect. In this case, if the seller takes the oath, the object is not returned to him, and it is returned if he refuses to take the oath.

Jurists disagreed over whether or not the judge should require the seller to take an oath if the buyer cannot provide a proof. 'Abū Ḥanīfa ruled that he should not require the seller to take an oath, while 'Abū Yūsuf and Muḥammad ruled that he should. The proof of the latter two jurists is that the buyer is claiming a legal right to return the object of sale, which he can only do if he can establish that the defect exists in his own possession. The existence of such a defect can only be established by a direct proof or by the seller's refusal to take an oath. In the absence of a proof, the only recourse for the buyer is to require the seller to take an oath. This ruling is in analogy to the requirement that the buyer take an oath if he cannot prove that the object of sale was affected while in the seller' possession. 'Abū Ḥanīfa's proof for his opinion is that requiring the seller to take an oath may only take place after a legal claim against him is established. However, such a legal claim does not exist without a proof that the defect ensued in the seller's possession. Thus, in the absence of such proof, the buyer has no case against the seller, and the

⁸³Al-Kāsānī ((Hanafi), vol.5, p.279 onwards), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.92 onwards).

latter is not required to take an oath. Thus, the chain of: (i) legal claim, (ii) requirement to take an oath, (iii) refusal to take an oath, which may only occur in sequence, is aborted at the first step.⁸⁴

Soliciting the seller's oath

The seller should swear an oath regarding his knowledge of the defect rather than a definitive oath regarding the fact of the matter. For instance, he may say: "I swear by Allāh that I did not know that this defect existed in this object at such a time". The reason for this ruling is that the seller is swearing regarding something other than his own actions. It is a general rule that oaths regarding matters other than one's own actions should be restricted to knowledge (or lack thereof). This is in contrast to the case of a person swearing an oath regarding his own actions, in which case he would swear definitively. For our purposes, if the seller refuses to swear an oath, the existence of the defect is established, and the buyer has the legal right to request voiding the sale. However, if the seller does swear the required oath, then he is immune from such legal disputes.⁸⁵

5.13.4 Option consequences, and voiding the contract

Consequences of the defect option

If a defect is discovered in the object of sale, the buyer has to choose one of two actions: (1) he may permit the contract to continue, in which case he is liable for the full price; or (2) he may void the contract, in which case he may recover the price if he had already paid it, and is relieved of the liability of paying it if he had not already done so. In the latter case, if the buyer had already received the defective item, he is required to return it to the seller.⁸⁶

The Shāfi‘īs and the Ḥanbalīs ruled in the case where the defect ensues in the possession of the seller, or if part of the merchandise were ruined by natural causes, that buyer has the option of accepting the diminished merchandise at the full price, or voiding the contract.⁸⁷

Voiding the contract

The object of sale may belong to one of two categories:

1. It may be in the possession of the seller. In this case, the sale is voided once the buyer says: "I have returned [the merchandise]", and there is no need to refer the matter to a judge or an arbitrator in the opinion of the Ḥanafīs and Shāfi‘īs.
2. It may be in the possession of the buyer. In this case, the sale may not be voided except by a judge or through arbitration and mutual consent

⁸⁴ Al-Kāsānī ((Hanafi), vol.5, p.279), 'Ibn 'Abidīn ((Hanafi), vol.4, p.92).

⁸⁵ Al-Kāsānī ((Hanafi), ibid.).

⁸⁶ Ibn Al-Humām ((Hanafi), vol.5, p.151).

⁸⁷ See *Al-Rawdah* by Al-Nawawī (vol.3, p.504), and 'Ibn Qudāmah (, vol.4, p.109 onwards).

in the opinion of the Hanafī jurists. This opinion is based on the fact that voiding the sale after receipt has the same status as a contract. In this regard, since the conclusion of a contract may not occur through the actions of one party alone, similarly its voiding requires that the actions of one is met with the consent of the other or the order of a judge. This is in contrast to the case of voiding a contract prior to receipt. In the latter case, the contract is not finalized, and thus voiding has the same legal status as receipt [which requires only one party, without the consent of the other or the order of a judge].

Al-Shāfi‘ī, on the other hand, ruled that the seller’s utterance of “I have returned the merchandise” voids the contract without the seller’s consent or the order of a judge. His proof is that voiding of a contract does not require the order of a judge or the consent of the seller, in analogy to the unanimous opinion in the conditional options, as well as the inspection option in the original Hanafī tradition.⁸⁸

Timing of contract voiding

The Hanafīs and Hanbalīs ruled that the option of returning defective merchandise can be relaxed in its time delay. Thus, if the buyer learns of the defect and does not return the item immediately, his option is not voided unless he takes some action that implies his consent. In particular, consider the case of a buyer who alerts the seller that the merchandise was defective, and they dispute whether or not he may return the merchandise. If the buyer moves away from that dispute and then returns and demands that he return the merchandise, his option is still valid as long as there is no obstacle to returning the merchandise. This follows since the objective of establishing the defect option is to remove a realized loss and harm, which allows for delay in analogy to taking revenge compensation. Thus, we do not accept the view that holding the object to be an implicit expression of consent.⁸⁹

The Shāfi‘īs, on the other hand, required that the merchandise be returned immediately after the buyer learns of the defect. Thus, they ruled that if the buyer discovers the defect and defers returning it with no excuse, then his right to return it is dropped. In this regard, the differentiation between “immediately” and “with delay” is determined by convention. For instance, if the delay is for the duration of a prayer at its due time, or to eat a meal, etc., then this is not conventionally considered a delay and his right to return the merchandise remains intact. Other examples include the inability to return the merchandise immediately due to sickness, fear of theft or other dangers, etc. In all such cases, the buyer’s right to return the goods is intact, unless he commits an act that implies that he has consented to the sale (e.g. using the purchased animal, wearing the dress, etc.). Their proof for this opinion is that the original status

⁸⁸ Al-Kāsānī ((Hanafī), vol.5, p.281), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.57), ’Abū ’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.284).

⁸⁹ ’Ibn ’Abidīn ((Hanafī), vol.4, p.93), ’Ibn Qudāmah (, vol.4, p.144), Marīt ibn Yūsuf (1st printing (Hanbalī), vol.2, p.41).

of a sale is bindingness. The overruling of the bindingness of the sale is thus viewed as a transitory property, allowed in the law to prevent financial harm, and thus must be instantaneous in analogy to *shuf'a*. It is thus voided by any delay without excuse.⁹⁰

5.13.5 Return impediments and option dropping

There are several reasons why the defective merchandise may not be returned, in which case the defect option is dropped after its establishment. Those reasons may be divided into two categories: (i) those that ensue after the establishment of the seller's liability for the defect; and (ii) those where the seller is not initially liable for any defects.

The developments that may ensue after the seller's liability is established, and that prevent returning the defective merchandise, are as follows:

1. The buyer's consent to the defect after knowing of its existence: This consent may be expressed explicitly, by saying "I have accepted the defect", or "I have permitted the sale"; or it may be inferred from the buyer's actions. Actions that imply acceptance of the trade are dealings such as staining a dress or cutting it, building on land, threshing of wheat, cooking meat, etc. They also include selling the item, giving it as a gift, pawning it (even if it is not delivered), or any other use similar to those discussed in the section on the condition option. Another set of reasons that would prevent returning the defective merchandise are receiving a compensation for the defect, either in effect or in lieu of another collected compensation.

Those reasons result in dropping the option since the right to return the merchandise is based on the absence of a quality implicit in the contract. If the buyer accepts the defect, we infer that he did not make that quality a condition for the contract. Moreover, if he accepts the defect, he is implicitly accepting whatever harm comes with it (i.e. declining the seller's liability to compensate him for the defective part). In the case of receiving compensation, the buyer has in effect received an alternative to returning the defective part to its perfect form. In this respect, receiving the value of the defective part replaces that part with its value, which is equivalent to selling that part.

2. An explicit or equivalent dropping of the option: For instance, the buyer may say: "I have dropped this option", or "I have voided it", "I have made this sale binding", etc.

The developments that prevent returning the defective merchandise in the cases where the seller is not initially liable for any defects in the object of sale are as follows:

⁹⁰ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.56), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.274).

1. Natural impediments: Those include the cases where the object of sale perishes by natural causes, through the actions of the object itself, or due to being used by the buyer (e.g. eating the food). In such cases, the perishing of the object of sale prevents its return, but the buyer still has an established right to seek compensation for the defect from the seller.⁹¹
2. Legal impediments: Those comprise: (a) non-derivative connected changes that occur in the object of sale before or after delivery (e.g. staining a dress, building on land, etc.), and (b) derivative non-continuous additions that occur after delivery (e.g. giving birth, bearing fruit, etc.). Other changes and additions do not prevent returning the defective merchandise.

We now elaborate on the above:⁹² Any changes or additions to the object of sale may occur: before or after receipt; and each may be continuous or discontinuous.

Changes that occur prior to receipt

Such changes may be:

- (a) If the addition is continuous, it may be derivative of the item itself (e.g. beauty, age, weight, etc.), and this class of additions does not prevent returning the merchandise since they are integral to the item. Thus, the buyer has the choice of returning the entire merchandise, or keeping it in exchange for the full price.

On the other hand, the additions may be continuous but not derivative of the merchandise (e.g. staining a dress, sewing it, building, planting vegetables, etc.). Such changes or additions prevent returning the object of sale since they constitute an independent item. In this case, the object of sale may not be returned without those items due to the obvious difficulties that would entail, but it cannot be returned with the changes since they are not appended to the sale and thus may not be appended to a voiding of the contract.

- (b) If the changes or additions were not continuous, it may be derivative from the object itself (e.g. child, fruit, milk, etc.), and such changes do not prevent returning the merchandise. In this case, the buyer may return both the object of sale and the additions, or he may keep both for the full price.

The additions may also be discontinuous and non-derivative (e.g. income, charity, produce, etc.). Such additions also do not prevent returning the merchandise since they were never sold, but were rather owned by whoever owned the original object.

⁹¹ Al-Kāsānī ((Hanafi), vol.5, p.282), 'Ibn 'Abidīn ((Hanafi), vol.4, pp.86,99), *Majmā' Al-Damānat* (p.219), *'Aqd Al-Bay'* by Professor Al-Zarqā' (p.110), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.54).

⁹² Al-Kāsānī ((Hanafi), vol.5, p.284 onwards), 'Ibn 'Abidīn ((Hanafi), vol.4, pp.85,98), *'Aqd Al-Bay'* (ibid, p.111).

Changes that occur after receipt

(a) If the addition or change is connected to the object of sale, it may be derivative of it (e.g. the fat of an animal). For this class of changes or additions, the Hanafīs, Shāfi‘īs, Ḥanbalīs, and Mālikīs all agree that there is no impediment to returning the defective object.⁹³ In such a case, the legal status of the defect is attached to the original object of sale. Thus, if the buyer decides to return the change or addition with the original object, he may. On the other hand, if the buyer demands compensation for the defect, and the seller refuses to pay, then we have multiple opinions:

- ’Abū Ḥanīfa and ’Abū Yūsuf ruled that the seller does not have the right to refuse, and the buyer has the right to take compensation for the defect. Their proof is that the connected addition to the object of sale prevents voiding the sale after receipt if the owner of the addition (the buyer) does not wish to return it.
- Muḥammad ruled that the seller has the right to reject the buyer’s demand for compensation. His proof is that the connected addition does not prevent voiding the contract after receipt in his opinion.
- The origin of this difference in opinion ensued over the legal status of an increase that is connected to the dowry if the husband divorced his wife prior to consummation.

If the addition is not derivative of the object of sale, then there is agreement that it does not prevent returning the defective merchandise. In this case, the addition is the property of the buyer, and the seller may not take it without compensation. In this case, the object of sale should be returned, and the seller should compensate the buyer.

(b) If the addition is disconnected and derivative from the original object of sale (e.g. child, fruit, milk, etc.), the Hanafīs ruled that it prevents returning the object of sale to the seller. Their proof is that returning the original object of sale without the addition would leave the buyer with this addition without having paid a compensation for it. This is forbidden *ribā*.

The Shāfi‘īs and Ḥanbalīs, on the other hand, ruled that such an increase does not prevent returning the object of sale, and the addition remains with the buyer. Their proof is that the addition ensued in the property of the buyer, and thus does not prevent returning the original object, in analogy to non-derivative additions. This ruling is also based on the narration that a man bought a young slave from another. After a time, the buyer found a defect in the slave, and

⁹³ Al-Khatīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.71), Ibn Qudāmah (, vol.4, p.144), *Hāshiyat Al-Dusūqī* (vol.3, p.121).

disputed the validity of the sale in front of the Prophet (pbuh). The Prophet (pbuh) ruled that he may return the slave to the seller. The seller protested: “O Messenger of Allāh, he used my slave”, and the Prophet (pbuh) responded: “The output is the property of the one who held the liability (*Al-kharāj bi-l-damān*)”.⁹⁴ The meaning of this Ḥadīth is that the benefits derived from the object of sale are compensation for the liability on the buyer regarding potential perishing or diminution in the object of sale. This compensation is implicit in the determination of the object’s price.

However, if the addition is not derivative (e.g. income or charity), then there is no impediment to returning the original object of sale to the seller. In this case, the buyer is entitled to keeping the addition, since it was never part of the sale, and thus voiding the original sale (without the addition) remains possible.

3. Impediments caused by one of the buyer’s rights: This class of impediments is caused by the development of a new defect in the buyer’s possession (i.e. after receipt), while the object contained an old defect that occurred in the seller’s possession (i.e. before receipt). In this case, the object of sale exited the property of the seller with only one defect. Thus, if it is returned with two defects, the seller is harmed. Moreover, a condition of returning an object of sale is that it be returned in the same condition in which it was received. In this case, the only recourse for the buyer is to demand a compensation for the initial defect from the seller, unless the seller chooses to take back the merchandise itself. The reduced value for which the buyer deserves compensation is to be determined for the day the contract was initiated.⁹⁵ However, if the new defect is removed (e.g. if a sick animal is healed), then the initial option – the right to return the defective merchandise – is re-instated.
4. Impediments caused by the rights of a third party: An instance of this class of impediments occurs if the buyer transfers his ownership of the defective merchandise to another (through a sale, a gift, etc.), and then discovers that it had an old defect. In this case, the first buyer is incapable of voiding the initial sale since a third party (the new buyer) has a legal right that was established by the initial buyer.⁹⁶
5. If the buyer ruins the merchandise (e.g. killing the purchased animal, tearing the purchased dress, etc.), and then discovers the existence of an

⁹⁴Narrated by ’Aḥmad, ’Abū Dāwūd, and ’Ibn Mājah on the authority of ʿĀ’isha (mAbpwh). The narration listed above is that of ’Abū Dāwūd. The meaning of *Al-kharāj bi-l-damān* is that income is only justified by the taking of risk. In this case, the produce of the object of sale is the benefit that the buyer collects in compensation for his taking liability for the object of sale itself; c.f. ’Ibn Al-’Athīr Al-Jazarī (, vol.2, p.28), Al-Shawkānī (, vol.5, p.213).

⁹⁵*Majma’ Al-Damānāt* (p.220), ’Ibn Al-Humām ((Hanafi), vol.5, p.164).

⁹⁶*c. Aqd Al-Bay* (ibid).

old defect, then he is liable for the price named in the contract, with no right to demand compensation for the defect. The difference between this class of impediments and the preceding one is that the impediment may be removed in the previous case (thus returning the right to return the merchandise), whereas it is impossible for this impediment to be removed.⁹⁷

If a new defect ensues in the buyer's possession, and then he discovers an earlier defect that ensued in the seller's possession, the buyer may demand compensation for the earlier defect. In this case, the object of the sale may only be returned by mutual consent. If compensation is paid, its amount must be assessed in relation to its value on the day of the sale.⁹⁸

In summary, the buyer may demand compensation from the seller for the value of the defect in three cases: (i) the perishing of the object of sale; (ii) the development of a new defect; and (iii) a fundamental change in the object of sale, which gives it a new label.

The previous discussion covered the case where the buyer was buying on behalf of himself. However, if he were contracting on behalf of another, we need to consider multiple cases:

- If the person contracting on behalf of another may be made liable in a legal dispute (e.g. a commissioned agent, a partner, a silent partner, etc.), then he is bound by such a disputation to return the object to the seller. This follows since returning defective merchandise is one of the rights of the contract. In this regard, the rights of the contract are available to the contractor who may be liable in a legal dispute, in analogy to the contractor on his own behalf. Thus, whatever decision the ultimate party to the contract makes is transferred to the one who conducted the contract on his behalf.⁹⁹
- If the immediate contractor may not be made liable in a legal dispute (e.g. a judge or religious leader making a legal decision), then he may commission an adversary for a legal dispute regarding the defect. Then any compensation that he ruled for that adversary goes to the ultimate party of the contract. If that party is all Muslims, then the compensation goes to the Muslim treasury (*bayt al-māl*).
- If the immediate contractor were a boy under guardianship who bought or sold with the permission of another, then he is not liable in legal disputes. The party to the dispute in this case is the ultimate buyer who commissioned the boy. In this case, the ultimate buyer is the mediate contractor, and the immediate contractor is not bound by any of the rights of the contract. The role of the boy, thus, is restricted to performing the transaction for another, in analogy to a messenger or an agent in a marriage contract.

^{97c} *Aqd Al-Bay*^c (p.112 onwards).

⁹⁸ *Majmū Al-Damañāt* (p.220), 'Ibn Al-Humām ((Hanafi), vol.5, p.164).

⁹⁹ 'Ibn ^cĀbidīn ((Hanafi), vol.4, p.89).

5.13.6 Seller liability for defects

Jurists disagreed over the case of a seller who stipulates a condition in the contract that he is not liable for defects, where the buyer accepts the condition based on the apparent lack of defects. What is the ruling if the buyer later discovers an old defect?¹⁰⁰

- The Hanafis ruled that a sale with a condition that the seller is not liable for defects is valid,¹⁰¹ even if the specific potential defects are not named. They ruled that such a sale is valid whether the seller does not know of the defect and stipulates the condition for self-protection, or knows of it and does not tell the buyer about it. The sale is valid since the non-liability condition drops one of the rights of the buyer, and is not a transfer of ownership. Ignorance when dropping a right does not lead to legal disputes since it does not require delivery of any object of sale. Stated generally, such a stipulated condition covers all defects that may occur prior to the sale or after it and before receipt. In all such cases, the defective merchandise may not be returned. This is the narrated opinion of 'Abū Ḥanīfa and 'Abū Yūsuf. Their proof is that the objective of the seller is to make the contract binding by dropping the buyer's right to specify the condition in which the merchandise needs to be. He would thus be trying to make the sale binding immediately, which limits the possible defects covered by the condition to those that exist prior to delivery.
- Muhammad, Zufar, Al-Hasan ibn Ziyād, Mālik, and Al-Shāfi'ī, in what became the standard in our civil law, ruled that such a condition covers only defects that existed at the time of the contract. Thus, such conditions exclude defects that develop after the contract and before receipt. Their proof is that lack of liability covers things that already exist, whereas making a person not liable for things that have not yet occurred is not reasonable.¹⁰²

The above differences in opinion apply to the case where a buyer says: “you are not liable for any defects”. However, if the seller says: “I sell you this item on the condition that I am not liable for any defects it may have”, then all jurists agree that new defects are not covered by this condition. In this case, the seller did not make the excuse from liability in general, but restricted it to defects that existed at the time of the contract.

Consider the case of a seller who stipulated a general condition of non-liability for all defects, and then the buyer and seller disagreed over whether or not a defect existed at the time of the contract. Assume, further, that the seller claimed that the defect existed at the time of the contract, and therefore covered by the condition, while the buyer claimed that it occurred afterwards and is not

¹⁰⁰ *Al-Madkhal Al-Fiqhī Al-Ām* (p.377), ^c *Aqd Al-Bay*^c (p.107).

¹⁰¹ Ibn ^c Ābidīn ((Hanafi), vol.4, p.100), ^c *Aqd Al-Bay*^c (p.117).

¹⁰² Al-Kāsānī ((Hanafi), vol.5, p.227), 'Ibn Al-Humām ((Hanafi), vol.5, p.182), 'Ibn ^c Ābidīn ((Hanafi), vol.4, p.100).

covered by the condition. In this case, Muhammad ruled that the seller's claim is accepted if he swears an oath to its truth. His proof is that the non-liability is general, and the buyer is claiming the right to return the merchandise after the establishment of general non-liability of the seller to accept any returns based on defect. Thus, when the seller denies the buyer's claim, his statement is the relevant one. Zufar and Al-Hasan, on the other hand, ruled that the buyer's claim has precedence. Their proof is that the right to return defective merchandise was established initially and then dropped by the buyer. Thus, the buyer must determine what falls under the non-liability that he has given the seller.¹⁰³

Note that the condition discussed so far covers all manifest and hidden defects. However, the language of the condition may specify a particular set of defects to the exclusion of others. For instance, if the buyer says: "you are not liable for all diseases", 'Abū Yūsuf ruled that the condition applies only to manifest diseases to the exclusion of internal ones (e.g. liver disease, etc.). 'Abū Hanīfa, on the other hand, was reported to have ruled that this language would apply only to internal diseases to the exclusion of manifest ones, which would be called "sickness" (*marad*) rather than "disease" (*dā*). 'Ibn 'Ābidīn favored the latter opinion, arguing that it is consistent with conventional usage. However, the most accepted opinion in the Ḥanafī school is that linguistic and conventional use equate the two terms (sickness and disease), and therefore both manifest and non-manifest diseases are covered by this condition.¹⁰⁴

Similarly, if a buyer exonerates the seller of all major transgressions such as adultery, theft, etc., then the condition covers those defects as well as any other that is conventionally understood to be in the same category.¹⁰⁵ However, if the exoneration is restricted to a specific set of defects (e.g. burns), then the condition is not generalized, since the buyer in this case dropped a specific right, rather than a more general set of rights.¹⁰⁶

Consider a case where the stipulated condition of non-liability was restricted to a specific defect that was named by the buyer and that existed at the time of the contract. Further assume that the buyer and seller later disagree, with the buyer claiming that the defect developed after the contract and the seller claiming that it existed prior to the contract. In this case, Muhammad ruled that the buyer's claim has precedence. His proof is that the non-liability relates to conditions at the time of the contract, and while the buyer claims that the defect happened in the more recent past, the seller claims that it happened in the more distant past. Thus, he ruled that the circumstances support the buyer's claim.¹⁰⁷

The discussion above covered the opinions in the Ḥanafī school regarding a general condition of non-liability for conditions. The other schools of jurisprudence discussed this condition in the context of knowledge or ignorance of the

¹⁰³ Al-Ķāsānī ((Hanafi), vol.5, p.277).

¹⁰⁴ 'Ibn 'Ābidīn ((Hanafi), vol.4, p.100), Al-Ķāsānī ((Hanafi), vol.5, p.278).

¹⁰⁵ Al-Ķāsānī ((Hanafi), vol.5, p.278), 'Ibn 'Ābidīn ((Hanafi), ibid).

¹⁰⁶ Al-Ķāsānī ((Hanafi), vol.5, p.277).

¹⁰⁷ 'Ibn 'Ābidīn ((Hanafi), vol.5, p.278)

existence of a defect:

- The Mālikīs ruled that the condition of non-liability for defects is not valid except for defects in slaves who have lived long with the seller, and that are unknown to the seller. On the other hand, non-validity for defects that are known to the seller, exist in any object of sale other than slaves, or in slaves who have not lived with the seller for some time, is not valid.¹⁰⁸
- The Shāfi‘is ruled that the general condition of non-liability for defects applies only to non-manifest defects in animals, provided that the defects are unknown to the seller. Thus, the non-liability would not apply to defects in items other than animals (e.g. clothes or buildings), nor to manifest defects in animals, regardless of whether or not the seller is aware of them. Also, the non-liability does not apply to non-manifest defects in animals if they are known to the seller.

Moreover, they ruled that non-liability applies only to defects that existed at the time of the contract, and not to those that develop afterwards and before receipt. If the two parties to the contract dispute whether or not the defect existed at the contract time, the seller's claim has the precedence in their school.

They also ruled that if the seller stipulates a condition of non-liability for defects that may develop after the contract and prior to receipt (or both defects that existed before and those that develop), then the condition is not valid. Their proof is that this condition would amount to dropping something prior to its establishment, analogous to non-liability for a price of an item that he had not sold to him.¹⁰⁹

- The Hanbalīs have two reported narrations regarding ’Aḥmad’s opinion. One narration reports his ruling that non-liability is not applicable unless the buyer is aware of the defect (this is also the opinion of Al-Shāfi‘ī), and the other narration reports his ruling that the seller is thus not liable for all conditions of which he was ignorant, but liable for the ones that he knew.

’Ibn Qudāmah and others ruled that non-liability is not in effect for one who sells an animal to another with a condition of non-liability for any defects, or a specific existing defect. This is their ruling regardless of whether the seller knew of the defect or did not know.¹¹⁰

5.14 Inspection option (*khiyār al-ru’yah*)

Some of the authors list this option before the defect option, since it has more serious consequences. In this regard, the inspection option prevents the conclu-

¹⁰⁸ *Hāshiyat Al-Dusūqī* (vol.3, p.119), ’Ibn Juzayy ((Mālikī), p.265), Al-Dardīr ((Mālikī)B, vol.3, p.164).

¹⁰⁹ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.53).

¹¹⁰ ’Ibn Qudāmah (, vol.4, p.178), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.27).

sion of sale, whereas the defect option only prevents the bindingness of its legal status, consideration of which only comes after conclusion. However, I chose to diverge from this practice due to the similarities between the condition option and the defect option, as noted above. Moreover, the condition option, the defect option, and the specification option (*khiyār al-ta^cyīn*) are established by the contractors' stipulation; whereas the inspection option is established based on the Law (*shar^c*).

The discussion of the inspection option will proceed in seven subsections:

1. Legality of the inspection option.
2. Time of its establishment.
3. Means of its establishment.
4. Characteristics of sales with inspection options, and their legal status.
5. Conditions for the establishment of the inspection option, and their consequences.
6. Reasons for dropping the inspection option.
7. Reasons for voiding the contract, and the conditions of voiding.

5.14.1 Legality of the inspection option

The Hanafis rendered the inspection option valid in sales of items that were not seen or inspected by the buyer. Thus, the buyer is given the option at the time when he inspects the merchandise of either taking the merchandise for the full named price, or returning it to the seller. Thus, even if the buyer said: "I have accepted this sale", and then saw the merchandise for the first time, he has the right to return it. This follows since the option is tied to the inspection of the merchandise, and consent to something prior to knowing its characteristics is not given any consideration. In this respect, his expression of acceptance prior to inspection should not be considered. This is in contrast to his expression of willingness to return the object, which does not require inspection. The Hanafis' proof of the legality of the inspection option is the *Hadīth* narrated on the authority of 'Abū Hurayrah and 'Ibn 'Abbās (mAbpwt): "If someone buys an item without seeing it, then he has an option until he sees it".¹¹¹

They also relied on the narration that ^cUthmān ibn ^cAffān (mAbpwh) sold a land to Tālḥah ibn ^cAbd-Allāh (mAbpwt), when neither of them had seen the land. Someone told Tālḥah: "You have been subject to injustice", to which he replied: "I have the option, since I bought an item that I have not seen". They took the matter to Jubayr ibn Mut^cam, who ruled that Tālḥah had the

¹¹¹This *Hadīth* has narrations with a full chain of narrators (*musnad*), on the authority of 'Abū Hurayrah; as well as a *mursal* narration on the authority of Makhūl. Al-Nawawī reported that there is a consensus among those who memorized *Aḥādīth* that it is a weak one (*da^cīf*).

option.¹¹² Thus, the option is for the buyer to the exclusion of the seller, even if the latter sold what he himself had not seen. This incident took place in the presence of companions of the Prophet (pbuh), and none of them contested this ruling. Thus, this narration constitutes 'Ijmā' (consensus among the early Muslims) regarding the legality of this option. They also relied on the following logical argument: ignorance of the characteristics of an item renders the buyer's consent incomplete. Such lack of total consent to the trade results in the establishment of the option.

Based on those arguments, the Ḥanafī jurists legalized selling an absent item without a description, relying on the establishment of the buyer's inspection option. They have also legalized selling an absent item with a description of warranted properties, in which case the buyer has the characteristics option, as we mentioned previously. Thus, the buyer has the option when he sees the merchandise: he may execute the sale, or he may return the merchandise, regardless of whether or not he agreed to the characteristics mentioned in the contract.

On the other hand, the Ḥanafīs did not legalize an inspection option for the seller who sold what he did not see. For instance, if a person inherits some land in a different country, and sells it prior to seeing it, the sale is valid without any options for the seller. 'Abū Ḥanīfa initially ruled that the seller in this case has the same option afforded the buyer, in analogy to the condition option and the defect option. However, he later changed his opinion to the one listed above.¹¹³ The differential treatment of the buyer and seller in this case is logical, since the seller must have more information about the merchandise than the buyer. In this regard, the seller has no option, and should investigate the merchandise prior to the contract so that he does not fall prey to an injustice for which he may demand voiding the contract.¹¹⁴

The Mālikīs legalized only the characteristics option to the buyer alone. Thus, they ruled that an absent item may be sold based on a description of its characteristics, as long as the object of sale is unlikely to change prior to receipt. Thus, if the item is found to meet the listed characteristics, the contract becomes binding.¹¹⁵

Similarly, the Ḥanbalīs legalized only the characteristics option. Thus, it is valid in their school to sell a missing object that was described to the buyer, as long as the description is sufficient for a forward (*salam*) sale. Their proof in this case is that this is a sale based on description, which makes it valid in analogy to *salam*. In this regard, knowledge of the object of sale in this case and in *salam* is accomplished through knowledge of its apparent characteristics that affect its price. Hidden characteristics that were not part of the description

¹¹²Narrated by Al-Ṭahāwī and Al-Bayhaqī on the authority of ^cIqlimah ibn 'Abī Waqqāṣ that Ṭalḥah bought some property from ^cUthmān ..., c.f. Al-Ḥāfiẓ Al-Zayla^cī (1st edition, (Hadith), vol.4, p.9).

¹¹³Al-Sarakhsī (1st edition (Ḥanafī), vol.13, p.69 onwards), 'Ibn Al-Humām ((Hanafī), vol.5, pp.137-140), Al-Kāsānī ((Hanafī), vol.5, p.292), 'Ibn ^cĀbidīn ((Hanafī), vol.4, p.68).

¹¹⁴Al-'Amwāl wa Nazariyyat Al-^cAqd by Dr. Muhammad Yūsuf Müsā (p.481).

¹¹⁵Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.154), Hāshiyat Al-Dusūqī (vol.3, p.25 onwards).

are thus excluded from the option, and if the buyer finds that the object of sale meets the named characteristics, the contract becomes binding and may not be voided.

The more accepted of two opinions in the Ḥanbalī school states that it is not valid to sell an absent object without a description or prior inspection. The only exception to this rule is the program or envelope sale discussed above. In the general case, sales of items without inspection or description falls under the Prophet's (pbuh) "prohibition of *gharar* sales".¹¹⁶ In this regard, the sale of an item without inspection or description is analogous to buying the seeds inside the dates.

The Ḥanbalīs note that chain of narration for the *Hadīth* of the inspection option contains "Umar ibn Ibrāhīm Al-Kurdī, whose narrations are not accepted. Moreover, they argue that perhaps what was meant by this *Hadīth* is that buyer has the option whether or not to enter into this contract.

On the other hand, the Ḥanbalīs and the Zāhirīs have legalized the inspection option to **the seller** if he sold an item that he had not inspected, and that he had described to the buyer.

Al-Šāfiʻī in his new system (*madhhab*) ruled that the sale of an absent object is initially unconcluded, regardless of whether or not it was described. His proof is the *Hadīth* on the authority of 'Abū Hurayrah that the Messenger of Allāh (pbuh) "forbade the *gharar* sales". Since the sale of an absent object is a sale that contains *gharar*, it is not valid if the buyer is ignorant of the characteristics of the object of sale, in analogy to *salam*. Moreover, this sale is prohibited in the category of sales of what is not in the seller's possession, which includes that which is not present and that is not seen by the buyer. Al-Šāfiʻī finds the *Hadīth* of the inspection option discussed above, to be weak (*daʻīf*), following the opinion of Al-Bayhaqī. It is also noteworthy that this *Hadīth* was found by Al-Dāraqutnī to be invalid (*bātil*).

With regards to the Shāfiʻī condition of inspection of the merchandise, they have ruled that inspection prior to the contract is sufficient for non-changing items such as land or iron, to the exclusion of changing items such as foods. They have also found it sufficient to inspect part of the object if it is an indication of the quality of the rest (e.g. inspecting the top layer of wheat, nuts, flour, fat, dates, or food in a container). Similarly, the inspection of a random sample of a homogeneous commodity (e.g. grains) is sufficient.¹¹⁷

The Ḥanafīs countered the arguments of others with the argument that ignorance of an absent object of sale does not lead to dispute as long as the buyer has the option to return it and void the contract if the merchandise does not meet his expectations. In this regard, they argue that the *Hadīth* prohibit-

¹¹⁶Narrated by 'Ahmad and 'Aṣḥāb Al-Sunan Al-'Arba'a on the authority of 'Abū Hurayrah, narrated by Al-Tabarānī in *Al-Kabīr* on the authority of 'Ibn 'Abbas, and narrated in *Al-'Awṣat* on the authority of 'Ibn 'Umar and Sahl ibn Sa'd. The authentication of this *Hadīth* has been listed previously.

¹¹⁷Al-Khaṭīb Al-Shirbīnī ((Shāfiʻī), vol.2, p.18 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʻī), vol.1, p.263).

ing selling that which is not in one's possession¹¹⁸ is actually a prohibition of selling that which he does not own. Moreover, they argue that the prohibition of *gharar* sales refers only to items that are not properly specified.¹¹⁹

5.14.2 Time of establishment of the inspection option

The inspection option is established when the buyer sees (or inspects) the object of sale, and not before. In this regard, if the buyer permits the sale prior to inspecting the merchandise, the sale is not binding, and the option is not dropped. This follows since the Prophet (pbuh) established the option for the buyer following his inspection of the merchandise. If we were to establish an option of permitting the sale prior to inspection, and if he were to execute that option, the inspection option will no longer be established for him at the inspection time. That would contradict the text of the *Hadīth*, and therefore must be rejected.

On the other hand, jurists disagreed with respect to voiding the contract prior to inspection:

- Some jurists ruled that the buyer does not have the option to void the contract prior to inspection, since that would constitute an option that is established prior to inspection. Since we have seen that the buyer does not have the option of permission prior to inspection, he consequently does not have an option of voiding at such a time.
- The more correct opinion is that of the other jurists, who ruled that the buyer may void the contract prior to inspection. This opinion is not based on any option (since no options are established at that time), but rather on the non-bindingness of the purchase of that which the buyer had not inspected. In this regard, the non-binding contract may be voided in analogy to the case where a defect option is established, as well as the contracts of lending and depositing.¹²⁰

5.14.3 Means of establishing the inspection option

The Hanafi jurists differed over the means of establishment of this option:

- The better of their two opinions is that of Al-Karkhi and others that the inspection option is unconditionally established for all times, unless one of the reasons for its dropping exists (see discussion below). Their proof is that this is an option tied to the inspection of the object of sale, and thus is analogous to returning defective merchandise. Moreover, the reason for establishing this option is the incompleteness of the buyer's consent. In this regard, a legal ruling remains in effect for as long as its reason remain in existence.

¹¹⁸Narrated by 'Ahmad and 'Aṣḥāb Al-Sunan Al-'Arba'ah, and considered a *Hadībth ḥasan* by Al-Tirmidhī.

¹¹⁹Al-Sarakhsī (1st edition (Hanafi), vol.13, p.69 onwards).

¹²⁰Al-Kāsānī ((Hanafi), vol.5, p.295).

- Other jurists argued that the option is established temporarily until it is possible to void the contract after inspection. Thus, if the buyer inspected the merchandise and had the opportunity to void the contract but did not, the inspection option is dropped, even if none of the other reasons for dropping it (discussed below) exists.¹²¹
- It is interesting to contrast those opinions with the Ḥanbalīs' view that the inspection option is established immediately.¹²²

5.14.4 Sales with inspection options

Characteristics of such sales

The purchase of an item that was not previously inspected by the buyer is not binding on him. Thus, the buyer is given the option of voiding the sale or permitting it after he sees the merchandise. This ruling is based on the blocking of contract conclusion based on the lack of inspection of the merchandise. The latter implies ignorance of the characteristics of the merchandise, which in turn puts into question the buyer's consent, and necessitates an option to avoid post hoc regret. The Ḥanafis regard this ruling as effective regardless of whether or not the merchandise fit its description.¹²³ The Mālikīs, Ḥanbalīs, and the 'Imāmī Shi'ites, on the other hand, ruled that the sale is binding on the buyer if its characteristics agree with its description, and he has an option if they disagree with it.¹²⁴ The Zāhirīs, in contrast, ruled that the sale is binding if the characteristics agree with the description, and invalid otherwise.¹²⁵

Legal status of the sale

The legal status of this sale is equivalent to that of a sale without any options. Thus, it does not prevent the establishment of ownership in the two exchanged items (i.e. the buyer becomes the owner of the merchandise, and the seller becomes the owner of the price following the offer and acceptance). Thus, the inspection option only prevents the bindingness of the sale, in contrast to the condition option.

The reason for differentiating between the inspection and the condition options is thus: The sale in the inspection option case was conducted unconditionally, implying that it would be binding, other things being equal. However, the right to return the merchandise based on the inspection option has been legally established, thus suspending the bindingness of the contract. In contrast, the

¹²¹ Ibn Al-Humām ((Hanafi), vol.5, p.141), Al-Kāsānī ((Hanafi), vol.5, p.295), 'Ibn 'Abidīn ((Hanafi), vol.?, p.67).

¹²² Ibn Qudāmah (, vol.3, p.581).

¹²³ Al-Kāsānī ((Hanafi), vol.5, p.292), 'Ibn Al-Humām ((Hanafi), vol.5, p.137).

¹²⁴ Ibn Juzayy ((Mālikī), p.256), 'Ibn Qudāmah (, vol.3, p.582), Al-Ḥillī ((Shī'ah 'Imāmiyyah), p.146).

¹²⁵ Ibn Ḥaznī (, vol.8, pp.389,394).

condition option is accepted by both parties to the contract, thus affecting its immediate legal status, as detailed above.¹²⁶

5.14.5 Establishing the inspection option

Unless the following conditions are satisfied, the inspection option would not be established, and the sale would be binding:

1. That the object of sale can be specified (i.e. be a non-fungible *‘ayn*). Thus, if a sale involved the exchange of two identifiable objects, both the buyer and seller would have an option if neither one had inspected the respective items prior to the contract.¹²⁷ In contrast, for the case of exchanging a liability for another (currency exchange or *sarf*), neither party has an option since there is no benefit from such an option, as explained below. Finally, when exchanging a specified object (*‘ayn*) in exchange for a liability (*dayn*), the buyer has an inspection option, while there is none for the seller.

The reason for this ruling is that in the case of non-specification of the object of sale, the contract may not be voided by such an option. This follows since that which cannot be specified is not owned by virtue of the contract, but rather by virtue of receipt. Moreover, voiding of the contract can only affect those items that are owned by virtue of the contract. Thus, there is no benefit from allowing an option for non-specified items exchanged in a sale. In contrast, identifiable objects have specific benefits to their owners, thus establishing the option for the buyer to decide whether or not the specific merchandise meets his needs.

Thus, the inspection option is established in all contracts that may be voided; e.g. sales, leases, financial compensation for release from liability for another's property, distribution of rights, etc. All such contracts can be voided by returning such items, and thus allow for the establishment of an inspection option. On the other hand, an inspection option cannot be established for any contracts that may not be voided; e.g. dowry, the financial compensation for divorce at the instance of the wife (*khul’*), financial compensation for intentional killing, etc. All such contracts do not allow for voiding by returning such properties. Thus, the general fundamental rule according to Al-Kāsānī ((Hanafi), ibid) is this: “Whatever can be used to void a contract by returning is subject to an inspection option, and whatever cannot is not”.

2. Non-inspection of the object of the contract is a condition for the establishment of the inspection option. Thus, whatever was inspected prior to the contract, if it remains in its same condition, is not subject to an inspection option. However, if the item changes after inspection, the purchase

¹²⁶Al-Kāsānī ((Hanafi), ibid.).

¹²⁷Al-Kāsānī ((Hanafi), ibid.).

would still be considered a purchase of that which was not inspected, thus establishing the inspection option.¹²⁸

Means of effecting inspection

The buyer may inspect all of the merchandise or part of it. The criterion for establishment of whether or not the merchandise was inspected is whether or not the buyer gets enough knowledge about the merchandise.¹²⁹ To be more precise, if that which was not inspected is derivative of that which he inspected, then the buyer has no option regardless of whether or not what he inspected was sufficient to know the status of what he did not. This follows since the status of the derivative is the same as the status of the original item.

However, if that which was not inspected was not derivative of that which was inspected:

- If that which was inspected gave him enough information regarding what he did not inspect, then he has no option if that which was not inspected was in fact equivalent or superior to what was inspected. In this respect, the inspection of part is sufficient for knowledge of the whole.
- If what he inspected did not give him enough information regarding what he did not inspect, then he has an option in that which was not inspected. In this case, inspecting the part is equivalent for the other part to not having inspected anything.

Based on this ruling, it is sufficient to inspect the top layer of a pile of purchased grains, or the face and backside of a purchased animal. This is the opinion of 'Abū Yūsuf. For clothing, Muhammad ruled that inspection of the front and back of a folded dress is sufficient. However, Zufar ruled that the entire dress must be spread, which is the chosen opinion among the Ḥanafīs. In this respect, 'Ibn 'Ābidīn elaborated that if the inside of the dress was no different from its outside, then the option is dropped; but if its inside is found to be of lower quality, then the buyer retains the option.¹³⁰

In the case of purchasing an animal for its meat, it is necessary to touch the animal to determine the amount of fat. Thus, if the buyer only saw the animal from a distance, he retains his option, since such a sight is not sufficient to gain information about its meat, which is the reason for the sale. Similarly, if the animal is being purchased for its milk and offspring, then the rest of its body, including its udder, must be inspected, since inspection from a distance will not give the necessary information.¹³¹

¹²⁸ Al-Sarakhsī (1st edition (Hanafi), vol.13, p.72), Al-Kāṣānī ((Hanafi), ibid., pp.292-3).

¹²⁹ Al-Kāṣānī ((Hanafi), vol.5, p.293), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.68).

¹³⁰ Al-Sarakhsī (1st edition (Hanafi), vol.13, p.72), Al-Kāṣānī ((Hanafi), vol.5, p.293 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, p.142 onwards), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.69).

¹³¹ Al-Kāṣānī ((Hanafi), ibid.), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.70), 'Ibn Al-Humām ((Hanafi), vol.5, p.143).

As for carpets and covers for which there is a variance between the front and the back, inspection of the front alone results in no option, while inspection of the back alone maintains it.

In the case of buying homes, real estates, and gardens, the inspection of the outside and inside of the building, or the inspection of the outside of the garden and the tops of its trees, would result in no option. However, the inspection of the courtyard of a house would not be sufficient due to the great variance between houses, thus establishing the option. In the past, the leaders of the Hanafi school (with the exception of Zufar) had ruled that the inspection of the outside of a house and of its courtyard would be sufficient, even if the rooms were not inspected. However, this is not sufficient nowadays, making the difference in rulings a function of time and space rather than legal proof.¹³²

The above rulings apply to a single object of sale. However, if the object of sale is multiple, then we must consider different cases:

- If the objects of sale are varying countables (e.g. animals, clothes, watermelons, pomegranate, etc.), then if the buyer inspects only some of the items, he has an option in the rest. The variation between the items makes inspecting some insufficient for obtaining information about the whole.
- If the objects of sale are measured by weight or volume, or if they are homogenous countables (e.g. nuts, eggs, etc.), then inspection of part drops the option in the rest, provided that the un-inspected portion is similar to the inspected one. In such cases, inspection of part is sufficient for obtaining information about the whole.
- The above rulings relate to the case where all the objects of sale are in one container. However, if they are distributed over two containers, and of two different kinds, or of one kind with two different descriptions, then jurists agree that the buyer has an option. In this case, observing part of the contents of one container does not provide sufficient information regarding the contents of the other container.
- If the contents of both containers are of the same type and same description, then the leaders of juristic schools have differed in opinion:
 - The leading jurists of Balkh ruled that the buyer has an option, thus rendering the plurality of containers a plurality of types of merchandise.
 - The leading jurists of *Irāq* ruled that there is no option in this case, since inspection of part of a homogeneous bundle provides sufficient information regarding the rest, irrespective of the number of containers.¹³³

¹³² Al-Kāsānī ((Hanafi), vol.5, p.294), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.70), 'Ibn Al-Humām ((Hanafi), vol.5, p.144).

¹³³ Al-Kāsānī ((Hanafi), vol.5, p.294), *Hāshiyat Al-Shalabī* *alā Al-Zayla* (vol.4, p.26).

- If the object of sale is hidden under soil (e.g. carrots, onions, garlic, potatoes, etc.), then 'Abū Yūsuf provided the following analysis:

– If the merchandise is measured by weight or volume after cutting (e.g. garlic, onions and carrots), then if the buyer pulls some of the merchandise with the seller's permission, or if the seller pulls some with the buyer's permission, the buyer's option in the remainder is dropped. In this case, inspection of part of what is measured by volume is tantamount to inspecting the whole.

If the buyer pulled some of the merchandise without the seller's permission, then he has no option whether or not he approves of the quality of what he pulled. In this case, pulling the items from the soil renders it defective by stopping its growth and speeding-up the spoiling process. Since the ensuing of a defect in the merchandise while in the buyer's permission prevents returning it in all cases, this is particularly relevant if the defect was caused by the buyer's actions.

– If the merchandise in the soil is sold by number (e.g. carrots, turnips, etc.), then inspection of some is not tantamount to inspection of the whole. The variation between items in this case is similar to the case of clothes discussed above.

If the buyer pulls some of the merchandise without the seller's permission, then his option is dropped based on the resulting defect, in case what he pulled has some value. However, if what he pulled was of no value, then the option is not dropped.

- Al-Karkhī mentioned his ruling for merchandise hidden in the soil without distinguishing between those cases. His ruling was the establishment of the option for the buyer who inspected only part of the merchandise. Thus, after seeing the whole, the buyer has the option of accepting the contract or returning the merchandise.
- It was narrated that Muhammad stated 'Abū Ḥanīfa's opinion to be the establishment of an option for the buyer whether he pulled part or all of the merchandise. However, Muhammad's own opinion is similar to 'Abū Yūsuf's, where pulling part of the merchandise, and accepting its quality, makes the sale binding on the buyer.¹³⁴
- If the object of sale is fat in a glass jar, and if only the outside of the jar is inspected, then there are two opinions narrated on the authority of Muhammad:
 - The first narrated opinion is that this inspection is sufficient, thus dropping the option. In this case, inspection of the outside of the transparent jar gives sufficient information on its contents.

¹³⁴Al-Samarqandī ((Hanafi), vol.2, p.124 onwards).

- The second narrated opinion asserts that inspection of the outside of the glass container does not give enough information about its contents, since the color of the glass may give false information about the color of its contents. Thus, this inspection does not satisfy the purpose of giving information about the merchandise.¹³⁵

Some of the Ḥanafī scholars also ruled that inspection is not established by viewing the reflection of the merchandise in a mirror or in water. Their logic is that the buyer thus did not inspect the merchandise itself, but its image, thus his option is not dropped. However, the correct opinion is that the buyer in this case would have indeed seen the merchandise itself and not anything else, since face-to-face observation is not a condition for sight. For instance, we do see Allāh without face-to-face witnessing. In this case, the option is indeed established and not dropped, since the mirror may distort the shape and size of the merchandise, thus not providing sufficient information to satisfy the buyer's need. This is the reason for keeping the option, not the one given by the mentioned jurists.¹³⁶

Similarly, if a buyer observes fish in shallow water from which the fish can be collected without fishing or using other instruments, and if he takes the fish, some jurists ruled that he would have dropped his option, while the correct opinion held by others is that the option is not dropped. In this case, the water distorts the perceived size of the merchandise, making it look larger. This means that the buyer would not have obtained sufficient information on the merchandise, thus retaining his option.¹³⁷

Opinions of non-Ḥanafī jurists

The Mālikīs ruled that the sale of root crops (such as carrots, onions, turnips, etc.) is permissible provided that: (i) its unhidden part is inspected, (ii) some of it is pulled and inspected, (iii) and an estimate of its volume or weight is provided. In contrast, they ruled as impermissible conducting such a sale without an estimate based on the cultivated area. They also ruled that it is permissible to sell based on inspection of part of homogenous fungible merchandise (e.g. cotton), in contrast to non-fungibles where inspection of part (e.g. one dress out of many) is not sufficient.¹³⁸

The Shāfi‘īs and Ḥanbalīs ruled that the sale of root crops (e.g. carrots, onions, garlic, and turnips) is not permissible. Their opinion is based on the ruling that this is the sale of an unknown, which contains excessive uncertainty (*gharar*).

¹³⁵ Al-Kāsānī ((Hanafī), vol.5, p.294 onwards), 'Ibn 'Abidīn ((Hanafī), vol.4, pp.70-106).

¹³⁶ Al-Kāsānī ((Hanafī), vol.5, p.295).

¹³⁷ Al-Kāsānī ((Hanafī), ibid.).

¹³⁸ Al-Dardīr ((Mālikī)A, vol.3, p.186), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.156), Al-Dardīr ((Mālikī)B, vol.3, p.40).

Sale based on a sample (*bay' al-numūdhaj*)

In general, the majority of jurists render the sale valid and binding if the buyer inspects part of the merchandise that gives full information regarding the quality of the whole. In this respect, I mention sales based on a sample as a common example of such sales.

An instance of such sales is thus: a buyer may purchase a large amount of wheat after inspecting only a sample of the merchandise. Such sales are only possible for fungibles such as grains, cotton, etc.

The legal status of this type of sales in the different schools is the following: it is permissible in the Ḥanafī, Mālikī and Shāfi'ī schools, and impermissible for the Ḥanbalīs and Zāhirīs. In what follows, we discuss those rulings in some detail:

- The Ḥanafīs¹³⁹ ruled that items measured by weight and volume may be sold based on the inspection of part. This is based on the conventional satisfaction of buyers by inspecting part of a homogenous good. However, if the remainder of the merchandise is in fact of lower quality than the inspected part, then the buyer has an option in the whole merchandise, to avoid partitioning the contract prior to the sale. The more accepted of the Ḥanafī opinions is that this ruling applies regardless whether the merchandise is in one or two containers, as detailed above. Note also that clothes today are considered fungible, in contrast to their status at the time of writing the older cited references.
- The Mālikīs¹⁴⁰ ruled that the sale based on inspection of part is permissible for fungibles measured by volume or weight (e.g. cotton). This is in contrast to their ruling for non-fungibles (e.g. a container full of different pieces of cloth), in which case their best accepted opinion is the impermissibility of sales based on inspection of some items.
- The Shāfi'īs¹⁴¹ had three rulings on sale based on a sample: one opinion renders it valid, the other renders it invalid, and the third most correct one is that it is valid if the sample is part of the sold merchandise, and invalid otherwise.
- The Ḥanbalīs¹⁴² ruled that sale based on a sample is invalid. For instance, if the seller shows the buyer a measure of wheat from a large container, and then sold him the entire container based on the claim that it is of the same kind, they render the sale invalid. This ruling is based on their condition that the two parties inspect the merchandise in a manner that agrees with the sale. This condition is satisfied either by inspecting the entire merchandise, or by inspecting part that gives sufficient information

¹³⁹ Al-Zayla'ī ((Hanafī Jurisprudence), vol.4, p.26).

¹⁴⁰ Al-Dardir ((Mālikī)A, vol.3, p.24).

¹⁴¹ Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.9, pp.327,333 onwards).

¹⁴² Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.10), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.152)

about the rest (e.g. one of two sides of a plain dress, and the top layer of a container of homogeneous grains or dates, and other random samples of homogenous goods).

- The Zāhirīs ruled that sale based on a sample is invalid.¹⁴³

Commissioning an agent for inspection or receipt

If the buyer commissions another to inspect the merchandise without himself inspecting it, then: (i) if the inspecting agent accepts the merchandise, he renders the sale binding on the buyer, otherwise (ii) the inspecting agent may void the sale if he chooses. In this case, the commissioned agent replaces the original buyer in inspection, and the decision is delegated to him.

If the buyer commissions an agent to receive items purchased prior to inspection, the inspection of the agent takes the place of the buyer's inspection, thus dropping the buyer's option in the opinion of 'Abū Ḥanīfa. In contrast, 'Abū Yūsuf and Muḥammad ruled that the agent's receipt and inspection does not drop the buyer's option in this case. Their argument is that the buyer commissioned the agent to receive the merchandise, not to drop the option if he sees fit. Thus, they ruled that the agent in this case cannot drop the buyer's inspection option, in analogy to his inability to drop the buyer's condition and defect options. 'Abū Ḥanīfa's logic, on the other hand is that there is no difference between a legal agent commissioned to receive merchandise and one commissioned to conduct a purchase. Since the inspection of the latter is sufficient by consensus and drops the inspection option, so it is for the former. Thus, he argues that the commissioned agent for some action is an agent for completing the transaction, and dropping the option is part of the completion of receipt.¹⁴⁴

All three have agreed on the case of a buyer who sends a messenger to receive the merchandise, where the messenger inspects the merchandise and accepts it. In this case, the final buyer retains his option. They differentiate between a messenger (*rasūl*) and legal proxy or agent (*wakil*) thus: the commissioned legal proxy or agent is a primary party (*'asl*) to the receipt process, and thus the completion of the receipt is up to him despite the fact that the effects of his action affect the one who commissioned him. In contrast, the messenger is simply an agent (*nā'ib*) of the one who sent him in receipt. Thus, the receipt of the messenger is in fact receipt by the one who sent him, and the completion of such a receipt remains with the ultimate buyer.¹⁴⁵

They have also agreed with respect to the defect option (*khiyār al-^cayb*) that if a commissioned agent receives the merchandise, and accepts the defect after knowing of its existence, the buyer's option is not dropped.

With respect to the condition option (*khiyār al-shart*), the leaders of the Hanafi school have differed: some maintain that the above mentioned difference in opinion between 'Abū Ḥanīfa on the one hand, and 'Abū Yūsuf and

¹⁴³Ibn Hazm (, vol.8, p.457).

¹⁴⁴Al-Kāsānī ((Hanafi), vol.5, p.295 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, p.145).

¹⁴⁵Al-Kāsānī ((Hanafi), ibid.).

Muhammad on the other, applies here, whereas others asserted that the three agreed that this option is not dropped.

The Shāfi‘īs ruled generally that what is considered when discussing whether or not the merchandise was inspected relates only to the parties of the contract.¹⁴⁶

Effective inspection of the merchandise

In summary, inspection is not necessarily limited only to viewing by sight, but relates to the use of the appropriate sense to test the relevant attributes of the merchandise. For instance, inspection is attained by smelling items that are known thus, tasting foods, touching items that are known by texture, touching the fatty spots in sheep purchased to slaughter even if its color is not inspected, feeling the udder of sheep purchased for its milk, etc. In such cases, using eyesight is neither necessary nor sufficient for inspection, as detailed above.¹⁴⁷

In this respect, a blind person’s inspection is considered as complete as a sighted person’s for those items whose characteristics are known by other senses. Thus, a blind person’s inspection by smell, touch, taste, etc. is sufficient for inspections that do not require eyesight. For those items that require eyesight for a full inspection, a description provided by a sighted person is sufficient in lieu of his lost eyesight. For instance, if a blind person purchases fruits on a tree, a description alone takes the place of inspection, according to the most common opinion. Similarly, in a blind person’s purchase of a house or real estate, description is sufficient for adequate inspection.

If a blind person recovers his sight, his inspection option does not return at such a time. This follows since the description was legally sufficient as a replacement of direct eyesight. In general, the recovered ability to conduct the primary function (in this case direct eyesight) after obtaining a suitable replacement (*badil*, in this case the description) does not invalidate the legal status of the replacement. This ruling is thus in analogy to the case of one who prayed with a purification by dirt (*tayammum*), and then finds water.¹⁴⁸

In contrast, if a sighted person purchased an item without inspection, and it is described for him, his option is not dropped. In this case, the replacement (*badil*) is unacceptable while the primary action (*al-’asl*) is possible.

Disagreement regarding inspection

If the seller maintains that the buyer had already inspected the merchandise, and the buyer maintains that he had not, then the buyer’s assertion is accepted if accompanied by his oath. In this case, the seller is claiming that the contract is binding, while the buyer denies it, and thus the latter’s claim is the one to consider, but only based on his oath. The need for an oath follows since the

¹⁴⁶ Al-‘Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.9, p.329).

^{147c} *Aqd Al-Bay*^c by Professor Muṣṭafā Al-Zarqā’ (p.46).

¹⁴⁸ Al-Sarakhsī (1st edition (Hanafi), vol.13, p.77), ‘Ibn Al-Humām ((Hanafi), vol.5, p.146 onwards), Al-Kāsānī ((Hanafi), vol.5, p.298), ‘Ibn ‘Abidīn ((Hanafi), vol.4, p.70 onwards).

seller is claiming that the right of voiding the contract is dropped (thus rendering the sale binding), which is a valid legal claim, thus requiring an official oath solicitation to resolve the matter.¹⁴⁹

Inspection in the distant past

If a person purchased an item that he had inspected a month or so prior, then: (i) If the merchandise had the same characteristics at the time of sale as it had at the time of inspection, the buyer has no option, since his prior inspection gave him sufficient information. (ii) However, if he finds that the merchandise has changed, he has an option, since the prior inspection in this case did not provide sufficient information about the characteristics of the merchandise, and is thus as good as no inspection at all.

If the buyer and seller disagree regarding whether or not the merchandise had indeed changed between the inspection and sale times – where the seller claims no change and the buyer claims change – then the seller's claim is accepted provided it is accompanied by an oath. In this case, the claim of a change in the merchandise is a claim of a new event, while the default is that it did not take place, thus requiring a proof to support the claim. This is in contrast to the case where the disagreement was over whether or not the merchandise was ever inspected by the buyer, in which case the seller was the one claiming a new event (which is knowledge of the characteristics of the merchandise), and in that case the buyer's claim is accepted with his oath.¹⁵⁰

5.14.6 Dropping the inspection option

The inspection option is not dropped simply by an explicit verbal assertion: “I have dropped my option”, regardless of whether the assertion is made before or after inspection. This is in contrast to the condition and defect options that are dropped by such an assertion. The main difference between the inspection option and the other two is its legal establishment to meet legal needs. Thus, man has no right to drop it. This ruling is in analogy to the option of repealing a divorce during the permitted period. This option is legally proscribed and cannot be dropped by man during the specified period (*‘iddah*). In contrast, the condition option is established by a stipulation of the contractors, and thus may be dropped by them, and the defect option is an implicit stipulation since safety from defects is expected in objects of sale.¹⁵¹

The inspection option is dropped, and the sale rendered binding, by a voluntary (*‘ikhtiyārī*) or an involuntary (*darūrī*) action. Voluntary actions, in turn can be divided into ones where consent is explicitly manifested and ones where it is inferred. Explicit manifestation of consent is accomplished by a statement: “I have permitted the sale”, “I have agreed”, or “I have made my choice”, or similar explicit actions, regardless of whether or not the seller knows of the

¹⁴⁹ Ibn Al-Humām ((Hanafī), vol.5, p.150), 'Ibn 'Ābidīn ((Hanafī), vol.4, p.72).

¹⁵⁰ Al-Kāsānī ((Hanafī), vol.5, p.149), 'Ibn 'Ābidīn ((Hanafī), ibid.).

¹⁵¹ Al-Kāsānī ((Hanafī), vol.5, p.297).

permission. Implicitly inferred consent is manifested by dealing in the object of sale after inspection (and not before) in a manner that implies consent and permission. For instance, if the buyer receives the merchandise after inspecting it, his receipt would imply consent and render the sale binding. In this respect, receipt carries this legal weight due to its similarity to the sale contract.¹⁵²

Consequently, if the buyer gives the merchandise as a gift without delivering it, or if he offers it for sale, etc. prior to inspection, then the option is not dropped. This follows since the option in this case (prior to inspection) cannot be dropped by an explicit manifestation of consent, and therefore cannot be dropped by implicitly inferred manifestation of consent.

If the buyer pawns the merchandise and delivers it, or if he rents it or sells it to another, with the stipulated condition that the new buyer has an option, then the first buyer's option is dropped, regardless of whether this takes place before or after inspection. Even if the buyer dissolves the pawning by paying his debt, if the rental period elapses or if the new buyer returns the item based on the latter's condition option, and then the original buyer inspects the merchandise, he no longer has the right to return it based on the inspection option. The reason for this ruling is that the original buyer's action established a legal right for another in the merchandise, which requires his ownership of the goods. Such ownership, in turn negates the establishment of his inspection option, thus voiding it since it does not serve any purpose.¹⁵³

The involuntary actions that drop the inspection option include all events that are not caused by the buyer and that drop the option and render the sale binding. Those include the death of the buyer in the Ḥanafī school, in contrast to the opinion of Al-Shāfi‘ī as discussed above under the condition option. Other examples include: (i) the permission of one of two purchasing partners in the Hanafi school, (ii) the perishing of part or all of the object of sale, (iii) increase in the object of sale in a disconnected, connected and derivative, or non-derivative as detailed for the condition option.¹⁵⁴

Al-Kāsānī said: “The general rule is that whatever invalidates a condition or defect option invalidates the inspection option as well. However, the first two can be dropped by an explicit statement of dropping, whereas the third cannot be dropped thus, before or after inspection”.¹⁵⁵ This follows since the inspection option has been legally established as a right of Allāh (swt)¹⁵⁶ Thus, the contractor cannot drop this option on purpose. In contrast, the condition and defect options are established by the will of the contractors, and thus may be dropped by the will of the one holding it whenever he wishes. Thus, the differentiation is between the right of Allāh (or general right for all mankind) in the case of the inspection option, vs. the right of man in the humanly stipulated

¹⁵² Al-Kāsānī ((Hanafi), vol.5, p.295), 'Ibn Al-Humām ((Hanafi), vol.5, p.141).

¹⁵³ Al-Kāsānī ((Hanafi), vol.5, p.296), Al-Samarqandī ((Hanafi), vol.2, p.130 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, p.141).

¹⁵⁴ Al-Kāsānī ((Hanafi), vol.5, p.296 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, pp.141,149).

¹⁵⁵ Al-Kāsānī ((Hanafi), vol.5, p.297).

¹⁵⁶i.e. it is established to protect the general good of all people as a general rule from which individuals may not reach an agreement to diverge.

condition and defect option.

Al-Mirghīnānī said ruled that whatever invalidates the condition option (e.g. a defect, or a dealing in the merchandise by the buyer) also invalidates the inspection option. Moreover, if the dealing was one that cannot be reversed (e.g. freeing a slave), or a dealing that establishes a legal right for another (e.g. a sale, a pawnning, or a lease) then the option is invalidated whether the action took place before or after inspection. In such cases, voiding the contract becomes impossible, thus invalidating the option. If, on the other hand, the dealing did not establish a right for another (e.g. a sale with a condition option, bargaining, or a gift without delivery), then the option is not invalidated before inspection since it is not of higher status than an explicit manifestation of consent (which does not invalidate an inspection option prior to inspection). However, such actions would invalidate the option after inspection based on the inferred implication of consent.¹⁵⁷

5.14.7 Conditions of voiding

What voids a contract in this context

A contract is voided based on the inspection option by explicitly manifesting the voiding. For instance, the buyer may say: "I have voided the contract", "I have negated the contract", "I have returned the merchandise", etc. The contract may also be voided by the perishing of the object of sale prior to receipt, since one of the cornerstones of the sale would no longer be satisfied.¹⁵⁸

Conditions of voiding the contract based on the inspection option

The following conditions must be met for voiding based on the inspection option to be valid:

1. That the option be still in effect. Thus, if the option were dropped by one of the means described above, the contract is binding, and may not be voided.
2. That the voiding does not result in a partitioning of the contract for the seller (e.g. by returning part of the object of sale and permitting it for another). This follows since the partitioning of the contract causes the seller a loss. Moreover, the inspection option (before and after receipt) prevents the contract from being concluded, and the partitioning of a contract prior to its conclusion is invalid without any doubt.
3. That the seller knows of the voiding, so that he may know the status of his merchandise and deal with it accordingly. This is the opinion of 'Abū Ḥanīfa and Muhammad. 'Abū Yūsuf, on the other hand, does not require the knowledge of the seller, as seen before in the condition option.¹⁵⁹

¹⁵⁷Ibn Al-Humām ((Hanafi), vol.5, p.141 onwrds).

¹⁵⁸Al-Kāsānī ((Hanafi), vol.5, p.298).

¹⁵⁹Al-Kāsānī ((Hanafi), ibid.).

Note also that the inspection option, similar to the condition option, is not inherited by the heirs of a dead buyer. This follows since such options were legally established for the parties of the contract, and the heir is not a party to the contract. This is the opinion of Al-Zayla^{cī} and the Ḥanbali jurists.¹⁶⁰

Mālik, on the other hand, ruled that the inspection option is inherited in analogy to the specification and defect options. His argument is that inheritance is established for rights acquired by sale in the same manner that it is established for properties.¹⁶¹ This ruling is more logical, since the heir inherits all the properties and rights that belonged to the one whom he inherits, including the option right.¹⁶²

¹⁶⁰ Al-Zayla^{cī} ((Hanafī Jurisprudence), vol.4, p.30), Mar^{cī} ibn Yūsuf (1st printing (Hanbalī), vol.2, p.33).

¹⁶¹ Al-Kāsānī ((Hanafī), vol.5, p.268), 'Ibn Hubayrah ((Hanbalī), vol.1, p.211), Al-Dardīr ((Mālikī)B, vol.3, p.145).

¹⁶² *Al-'Amwāl wa Nazariyyat Al-^cAqd* by Dr. Muḥammad Yūsuf Mūsā (pp.477,487).

Part II

**Types of Sale ('*anwā'c u
al-buyū'*)**

Preliminaries

Sales may be partitioned into four categories with respect to the two compensations.¹⁶³

1. Exchange sale (*bay^c al-muqāyaḍah*), which is the exchange of one specific non-fungible for another (e.g. the exchange of a dress for an animal, etc.).
2. General sale (*al-bay^c al-mutlaq*), which is the exchange of a non-fungible for a fungible. This includes the common example of selling goods in exchange for general prices defined in: (i) a particular currency commonly in circulation, (ii) goods measured by weight or volume and assessed as a liability on the buyer, or (iii) homogeneous goods measured by numbers and assessed as a liability on the buyer.
3. Currency exchange (*al-ṣarf*), which is an exchange of one non-fungible for another, i.e. a general “price” for another. This includes the exchange of any common currency for another.
4. Forward sales (*bay^c al-salam*) that is the exchange of a liability (as the object of sale) for a non-fungible (as the price). In this contract, the price may be a non-fungible (^c*ayn*) or a fungible (*dayn*), but since it must be received during the contract session, it becomes non-fungible.

Receipt is not a condition for the first two types of sales (direct exchange and general sales), but it is a condition for the latter two. In the currency exchange contract, both compensations must be received, and in the forward sale the price (capital) must be received, as discussed above.

Sales may also be divided into four categories with respect to the price:

1. Cost-plus sale (*bay^c al-murābaḥah*), which is the exchange of an object of sale for a price equal to the original price plus a determined profit.
2. At-cost sale (*bay^c al-tawliyah*), which is the exchange of an object of sale at the same price originally paid for it by the seller.
3. Below-cost sale, or sale at a loss (*bay^c al-wadī ah*), which is the exchange of an object of sale at a price below the price for which the seller bought it, i.e. at a given loss.
4. Negotiation or bargaining sale (*bay^c al-musāwamah*), where the object of sale is exchanged for a price that is agreed upon by the buyer and seller. This is the most common sale currently, since sellers typically do not wish to disclose the cost at which they obtained the merchandise.

There are other types of historically known sales such as commission to manufacture (*'istiṣnā^c*) and the sale of fruits on the trees (*bay^c al-damān*).¹⁶⁴

¹⁶³ Al-Sarakhsī (1st edition (Hanafi), vol.5, p.84 onwards).

¹⁶⁴ Al-Kāsānī ((Hanafi), vol.5, p.134), 'Ibn Al-Humām ((Hanafi), vol.5, p.323), ^c*Aqd Al-Bay^c* by Professor Al-Zarqā' (p.11 onwards).

In what follows, we shall discuss in separate sections the forward sale, currency exchange, cost plus sales, at cost sales, and commission to manufacture. We have discussed general sales previously, but we mention in this chapter two items related to it that are usury (*ribā*) and revocation of the sale ('*iqālat al-bayf*).

Chapter 6

The Forward Contract (*salam*)

This chapter will proceed in five sections:

1. Legality of forward contracts.¹
2. The definition of forward contracts, and its cornerstones.
3. Conditions of the forward contracts.
4. The legal status of forward contracts.
5. Differences between general sales and forward contracts.

6.1 Legality of forward contracts

The legality of forward contract has been established in the Qur'ān, the Sunnah, and the consensus of the Muslim nation:

- In the Qur'ān, the verse of debts, "O you who believe! When you deal with each other in transactions involving future obligations in a fixed period of time, put them in writing" [2:282], established that legality. 'Ibn 'Abbās said: "I bear witness that the guaranteed lending for a known term was legalized by Allāh in his Book, and thus permitted". He then recited the verse [2:282].²
- In the Sunnah, 'Ibn 'Abbās narrated that the Messenger of Allāh (pbuh) came to Madīnah, and found its inhabitants using forward (*salam*) contracts in fruits for one, two, and three years. He (pbuh) said: "Whoever

¹tr.: in what follows, we use the terms "*salam*" and "forward contract" interchangeably.

²Al-Hāfiẓ Al-Zaylaī (1st edition, (Hadith), vol.4, p.44), 'Ibn Ḥajar (, p.242), narrated in Al-Shāfi'ī, Al-Tabarānī, Al-Hākim, and Al-Bayhaqī.

enters into a forward contract, let him specify a known volume or weight, and a known term of deferment".³

- As for the consensus of the Muslim nation, 'Ibn Al-Mundhir said: "All the scholars whose opinions we have memorized agreed that forward contracts (*salam*) are permissible, and acknowledged people's need for this contract." This follows since the growers of fruits and vegetables, as well as regular merchants, need funds to spend on themselves and their plants and businesses, thus permitting forward contracts to meet their needs.

In this respect, the forward (*salam*) contract was made an exception for the rule of impermissibility of the sale of non-existent items. This is a special license (*rukhsah*) given to the people to meet their economic needs and facilitate their daily lives.⁴

6.2 Defining *salam* and its cornerstones

6.2.1 Defining *salam*

Salam or *salaf* (lit: forward payment) is the sale of a deferred item in exchange for an immediate (forward) price. In other words, it is the sale of a liability whose characteristics are described in exchange for a price or capital-sum (*ra's māl*) paid in advance.⁵ The Shāfi'īs and Hanbalīs defined the forward contract thus: "It is a contract over described merchandise sold as a deferred liability on one party, in exchange for a price that is received during the contract session."⁶ The Mālikīs defined it thus: "It is a sale in which the capital sum (price) is paid in advance, and the object of sale is deferred to a specified term".⁷

Thus, the conditions of the *salam* or forward sale include all the conditions of sales in general, and adds specific conditions that we discuss in detail below.

6.2.2 Cornerstone of *salam*

The cornerstone of the forward sale is offer and acceptance. For the Ḥanafīs, Mālikīs, and Ḥanbalīs, the offer is established by using the terms: *salam* = *salaf* = forward, or *bay'* = sale together with the conditions of the forward contract. Thus, if the forward buyer (*rabbu al-salam*) said: "I pay this price to buy X

³Authenticated by the six 'Imāms in their books on the authority of 'Ibn 'Abbās; c.f. 'Ibn Al-'Athīr Al-Jazarī (, vol.2, p.17), Al-Hāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.46), Al-Samarqandī ((Hanafī), vol.2, p.4).

⁴Al-Sarakhsī (1st edition (Hanafī), vol.12, p.124), 'Ibn Al-Humām ((Hanafī), vol.5, p.323), Al-Kāṣānī ((Hanafī), vol.5, p.201), 'Ibn 'Ābidīn ((Hanafī), vol.4, p.212), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.199), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.102), 'Ibn Qudāmah (, vol.4, p.275).

⁵ibid. Note that linguistically, *salam* = *salaf*, where the former is the term used in Ḥijāz, and the latter is the term used in 'Irāq.

⁶Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.71), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.102), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.276).

⁷Al-Dardīr ((Mālikī)A, vol.3, p.195).

from you forward” (*salam* or *salaf*), and the other party says: “I accept”, the cornerstone of the contract is met. Similarly, it is met if the forward seller (*al-muslam 'ilayh*) says: “I have sold you X”, and listed the conditions of *salam*, and the forward buyer says: “I accept”.⁸

Zufar and the Shāfi‘is ruled that the *salam* contract is not concluded unless the term “forward” (*salam* or *salaf*) is used. Their proof is that the ruling by analogy dictates the non-conclusion of this sale of a non-existent objects, but that the Law allowed it only if one of those two terms is used. With respect to the term “sale” (*bay‘*), the Shāfi‘is have two opinions. Some ruled that the *salam* cannot be concluded with the term of *bay‘* (=sale), otherwise it would be a sale. Thus, they ruled that *salam* is different from regular sales, and cannot be concluded based on the usage of the latter’s name. Other Shāfi‘is ruled that it may indeed be concluded thus, since they considered *salam* to be a type of sale, which requires receipt of the price during the contract session, thus being concluded under the name of “sale” in analogy to currency exchange (*sarf*).⁹

The technical Arabic terms for the various parties in a *salam* contract are as follows:

- Forward buyer: *rabb al-salam* or *al-muslim*.
- Forward seller: *al-muslam 'ilayhi*.
- Object of forward sale: *al-muslam fih*.
- Price (capital sum) of a forward sale: *ra's māl al-salam*.

For the non-Hanafīs, the forward sale has the same three cornerstones of a regular sale: (i) parties to the contract (buyer and seller), object of the contract, and language (offer and acceptance).

6.3 Conditions of forward sale

The conditions of a forward sale may pertain to the price or to the object of sale. The leaders of juristic schools agreed that *salam* is valid if it satisfies six conditions: that the object of sale is of known (i) genus, (ii) characteristics, and (iii) amount; (iv) that the term of deferment be known, (v) that the price be known, and (vi) that the place of delivery be specified if the object’s transportation is costly.

They have also agreed that *salam* is permissible for all commodities measured by volume, weight, length, or number of similar items (e.g. nuts, eggs, etc.), as detailed below. On the other hand, they have disagreed over some of the conditions pertaining to the price and object of a forward sale, and with respect to dismissal of part of a *salam*. In what follows, I shall list those conditions as well as the most important differences in opinions in this regard.

⁸ Al-Kāsānī ((Hanafī), vol.5, p.201), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), *ibid.*).

⁹ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.102), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.297).

6.3.1 Conditions for the price of a forward sale

The Ḥanafīs stipulated six conditions for the price of a forward sale:

1. The genus of the price: The price has to be specified in monetary form (e.g. gold or silver coins), items measured by volume (e.g. wheat and barley), or items measured by weight (e.g. cotton, iron, etc.).
2. The type of the price: If there are multiple types of the specified genus in the area (e.g. multiple gold coins from different sovereign states, multiple types of barley, etc.), then the type must be specified, otherwise specification of the genus is sufficient.
3. The characteristics of the price must be specified (in terms of good, average, or poor quality).

Those three conditions were stipulated to avoid ignorance in the contract. In this respect, ignorance of the genus, type, or characteristics of the price could lead to dispute, and would render the sale defective.¹⁰

4. Specification of the amount of the price if it is measured in volume, weight, or number. Thus, it is not sufficient to point to the price without explicitly stating its amount. This condition was stipulated by 'Abū Ḥanīfa and Sufyān Al-Thawrī. Thus if the forward buyer says: "I give you those coins [or wheat, etc.] as a price of a forward sale", by pointing to the coins or wheat without their weight or volume being known, then the *salam* is not valid. In this respect, ignorance about the price results in ignorance about the object of sale, and the latter renders the contract defective.¹¹

However, if the price was measured by length (e.g. cloth, rugs, etc.) or number of non-homogenous items (e.g. watermelons, etc.), then the length or value of the items need not be stated explicitly. In this case, pointing to the price and specifying the items suffices for the Ḥanafīs. Similarly, specifying the amount or value of the price is not required if it is a specific and familiar object that was identified by pointing.¹²

On the other hand, 'Abū Yūsuf, Muḥammad, the Shāfi'īs, and most of the Ḥanbalīs ruled that knowledge of the amount of the price is not a condition. In this regard, they ruled that it is sufficient for the seller to see the price in order to determine its amount. This ruling renders the price an inspected compensation, in analogy to a specified price of object of sale in a regular sale.¹³ No record of 'Imām Mālik is available on this issue. However, it is known that he permitted gross-sale except in cases of major uncertainty (e.g. if the amount was very large).¹⁴

¹⁰Al-Kāsānī ((Ḥanafī), vol.5, p.201), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.337), 'Ibn Ḩābidīn ((Ḥanafī), vol.4, p.215).

¹¹ibid.

¹²'Ibn Al-Humām ((Ḥanafī), vol.5, p.338), Al-Kāsānī ((Ḥanafī), vol.5, p.202).

¹³Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.104), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.300), 'Ibn Qudāmah (, vol.4, p.298).

¹⁴'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.203), *Hāshiyat Al-Dusūqī* (vol.3, pp.197,218).

5. 'Abū Ḥanīfa stipulated a condition that all coins be inspected to avoid the ignorance that may lead to dispute and defectiveness of the contract. However, Muhammad and 'Abū Yūsuf ruled that this is not a condition.
6. The payment and receipt of the price during the contract session prior to the parting of the contractors is a condition, whether the price is fungible or non-fungible. Thus, if the two parties separate prior to the receipt of the price, the contract is invalid and void. This follows since the objective of *salam*, which is to give the seller the means to produce the object of sale, is no longer met. Moreover, if the price was a non-fungible object, and the parties separate without the seller receiving the price, the very nature of *salam* (price-forwarding) would not be met. This follows since the Messenger (pbuh) said: "Pay the forward price for a known volume".¹⁵ In this regard, the terms *salam* and *salaf* (=forward) were used to indicate the forward payment of the price. Thus, if the price payment is deferred, the sale would not be *salam*, and would be invalid. Thus, one of the two compensations must be received at the contract session for the term *salam* to apply.

If the price is a fungible (e.g. currency) it must also be delivered during the contract session. Otherwise, the sale would be an exchange of one liability/debt for another, since the object of sale is itself a liability on the seller. Such deferment would fall under the prohibition of the Messenger (pbuh) of "trading one deferred item for another" (*bay' al-kāli' bil-kāli'*).¹⁶ In this respect, since *salam* by its nature includes an element of uncertainty (*gharar*), where the object of sale may perish or fail to exist, it is not permissible to add to it the *gharar* involved in deferring the delivery of the price.

This condition is agreed upon by the Ḥanafīs, Shāfi'īs, and Ḥanbalīs.¹⁷ 'Imām Mālik, on the other hand, ruled that deferment of receiving the price is permissible for three days or less, even if this deferment is stipulated as a condition of the contract. He ruled thus regardless whether the

¹⁵This is part of the above listed *Hadīth*, c.f. Al-Ḥāfiẓ Al-Zaylaʻī (1st edition, (Hadīth), vol.4, p.46).

¹⁶Narrated by Al-Dāraqutnī in his *Sunan*, by 'Ibn 'Abī Shaybah, 'Ishāq ibn Rāhawīh, and Al-Bazzār in the *Musnad* of each, on the authority of 'Ibn 'Umar. The language of Al-Bazzār is: "The Messenger of Allāh (pbuh) forbade the *gharar* sales, the sale of one deferred item for another, and the discount re-purchase of debts". This language was also narrated by 'Ibn 'Udayy in *Al-Kāmil*, and found fault in its chain of narration that included Mūsā ibn 'Ubaydah. Al-Hākim rendered the narration of Al-Dāraqutnī (as it appears in the text above) valid, but expressed his concern that the only narration chain included Mūsā ibn 'Ubaydah. 'Aḥmad rendered it a weak narration (*da'īf*), but recognized that everyone agreed on the impermissibility of trading debts or liabilities for debts or liabilities. Al-Shāfi'ī said: "The *Hadīth* scholars consider this a weak narration. c.f. Al-Ḥāfiẓ Al-Zaylaʻī (1st edition, (Hadīth), vol.4, p.39), Al-Haythamī (, vol.4, p.80), Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.2, p.153), Al-Shawkānī (, vol.5, p.156).

¹⁷Ibn Al-Humām ((Hanafi), vol.5, p.342), Al-Kāsānī ((Hanafi), vol.5, p.202), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.218), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.102), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.300), 'Ibn Qudāmah (, vol.4, p.295), Marī ibn Yūsuf (1st printing (Hanbali), vol.2, p.79).

object of sale is fungible or not, and bases his opinion on the argument that *salam*, as an exchange, remains a forward contract (i.e. with the price paid before the delivery date for the merchandise) even if the price receipt is deferred. In this respect, a deferment of three days or less is close to deferment to the end of the contract session, and this similarity and proximity should give the two cases the same legal status. Thus, such a short deferment does not render the price “deferred” in the legal sense of *al-kāli’*.

Mālik then ruled that if the price delivery is deferred for more than three days, then: if the deferment was a stipulated condition, the contract is defective regardless of the length of deferment. However, if the deferment was not a condition of the contract, then there are two narrated opinions of Mālik in *al-Mudawwanah Al-Kubrā*: one rendering the *salam* defective in this case, and the other rendering it not defective regardless of the length of deferment. The accepted opinion is that any deferment past three days renders the contract defective.¹⁸

6.3.2 Conditions for the object of a forward sale

The Ḥanafīs stipulated eleven conditions for the object of a forward sale:

1. That its genus is known (e.g. specify whether it is wheat, barley, etc.).
2. That its type is known (e.g. type A wheat, type B wheat, etc.).
3. That its characteristics are known (e.g. high quality, medium quality, or low quality). Note that specification of the genus, type, and characteristics is sufficient. Thus, it is not valid in the contract to mention that the price will be part of new produce, which has not yet formed. That would constitute a direct sale of a non-existent item, which is not permitted.
4. That its amount is known by volume, weight, number, or size.

The reason for those four conditions, as in the case of the price, is to eliminate potential ignorance that may lead to dispute and render the contract defective. The Prophet (pbuh) said: “Whoever participates in a forward sale, let him buy a known volume or known weight for a known term of deferment”.¹⁹

5. That the two compensations would not fall under surplus *ribā al-fadl*; i.e. they should not both be measured by volume or weight, and they should not be of the same genus. Those two characteristics would render the sale inclusive of *ribā al-fadl*, and due to deferment also inclusive of *ribā al-nasi’ah*.

¹⁸ *Hāshiyat Al-Dusūqī* (vol.3, p.195), Al-Bājī Al-’Andalusī (1st edition (Mālikī), vol.4, p.300), ’Ibn Juzayy ((Mālikī), p.269).

¹⁹ Al-Sarakhsī (1st edition (Ḥanafī), vol.12, p.124), ’Ibn Al-Humām ((Ḥanafī), vol.5, p.337 onwards), Al-Kāsānī ((Ḥanafī), vol.5, p.207), ’Ibn ʻĀbidīn ((Ḥanafī), vol.4, p.215).

Thus, if the price and object of a forward sale are different (e.g. wheat for money) then the forward sale is valid. In other words, if the two compensations are measured by different means, and if they are of different kinds, then the forward sale is valid.²⁰

The Mālikis expressed this condition as follows: the price and object of a forward sale must be of different genera in a manner that permits deferring one. Thus, it is not permissible to have a forward sale of gold for silver, since that would constitute *ribā*. Similarly, it is not permissible to conduct a forward sale of food in compensation for other food. However, it is permissible to forward sell animals for gold and silver, regular goods for food, and regular goods for other regular goods.²¹

6. That the object of a forward sale be identifiable by specification (*yata^cayyan bi-l-ta^cyīn*). Thus, forward sales are not permissible if the object of sale is gold or silver coins, which are not identifiable and thus do not qualify as an object of sale. As for gold bullion and raw gold, there are two opinions: one states that they may not be objects of forward sales in analogy to gold coins, and another states that they are regular goods and may be objects of forward sales.

As an exception, 'Abū Ḥanīfa and 'Abū Yūsuf ruled that forward sales of fiat money (copper coins in their case) are permissible. They reasoned that such coins (or monies) are not a universal price, since they are only used as a price by convention. Thus, they view such coins as regular commodities that can be identified. Muḥammad, on the other hand, ruled that such coins are universal prices, and may not be sold in a forward contract.²²

7. Jurists differed over the condition that the object of a forward sale be deferred. Thus, we discuss the legal status of the forward sale of an immediately delivered good.

The Ḥanafīs, Mālikīs, and Ḥanbalīs ruled that deferment of the object of sale is a condition for validity. Their proof is the Prophet's (pbuh) saying: "Whoever participates in a forward contract should buy a known volume or weight for a known deferment term", which makes deferment a condition, just as it makes measurement by weight or volume a condition. Moreover, they argued, the legalization of *salam* was meant to relieve the people of unnecessary burdens, and such relief is only effected by deferment. Thus, if there is no deferment, there is no relief, and the contract is not valid. In this regard, viewing the permissibility of *salam* as a license requires that it be restricted only to the circumstances for which it was permitted.²³

²⁰ Al-Kāsānī ((Hanafi), vol.5, pp.186,214), 'Ibn ^cĀbidīn ((Hanafi), vol.4, p.217).

²¹ Ibn Juza'y ((Mālikī), p.269).

²² Al-Sarakhsī (1st edition (Hanafi), vol.12, p.136), Al-Kāsānī ((Hanafi), vol.5, pp.208,212).

²³ Al-Sarakhsī (1st edition (Hanafi), vol.12, p.125), Al-Kāsānī ((Hanafi), vol.5, p.212), 'Ibn Al-Humām ((Hanafi), vol.5, p.335), Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.4, p.297), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.201), *Hāshiyat Al-Dusūqī* (vol.3, p.205 onwards),

Al-Shāfi‘ī ruled that forward contracts are valid whether the object of sale is deferred or not. He reasoned thus: if *salam* is permitted with a deferred object of sale, then it must be permitted with an immediately delivered object of sale, since the latter case eliminates *gharar*. Therefore, he argues that the statement in the *Hadīth* of “a known term of deferment” necessitates knowledge of that term and not the deferment itself. He further argued that *salam* still serves a purpose in this case that is not served by regular sales, in that the former permits the contract while the object of sale is absent at the contract session. In this regard, the Shāfi‘īs render as invalid sales of items that are not present and seen at the contract session. This follows since deferring the contract to bring the merchandise may cause the latter to become defective, or since the buyer may not be able to collect the merchandise or to void the contract that would be established and binding.²⁴

Jurists also disagreed over the deferment period in a forward sale:

- The Ḥanafīs and Ḥanbalīs ruled that the term of a *salam* should be approximately one month, since that is the earliest for an item to be considered deferred, and the shortest for it to be considered forward.
- The Mālikīs ruled that the shortest a deferment can be is half a month. Their proof is that this period is sufficiently long for market conditions to change, which may make it possible for the seller to obtain the object of the forward sale. An exception to this rule is considered if a condition of the forward sale was receipt of the object of sale as soon as it arrived to a city other than that where the contract took place, and where the distance between the two cities is two days or more. In this case, the distance between the two cities gives sufficient reason to expect differences in markets in the two places. Moreover, for this exception to apply, the contract must also include conditions that travel to the other city will begin immediately, and the buyer and seller (or their agents) must indeed leave, and the price must be delivered during the contract session or thereafter. Finally, the travel distance between the two cities must be two days on land or without wind, otherwise the distance may be cut in half a day with favorable wind, resulting in “immediate forward sale” (*al-salam al-hāl*). Thus, if any of those five conditions is not satisfied, the period of deferment must be specified. However, the Mālikīs rule that if all five conditions are satisfied, then the term of deferment need not be specified.
- Jurists agreed that the term of deferment must be known, based on the verse: “When you deal with each other in transactions involving

²⁴Ibn Qudāmah (, vol.4, p.289), 'Ibn Juzayy ((Mālikī), p.269), Marī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.78).

²⁴Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.297), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.105).

future obligations in a fixed period of time” [2:282], and the Prophet’s (bpuh) saying: “To a known term of deferment”. Moreover, by knowing the term of deferment, the date of delivery of the object of forward sale is specified, while lack of knowledge of that date would constitute *gharar* for the forward buyer. However, they have differed over the means by which this term of deferment is known.

- The Hanafīs, Ḥanbalīs, and Shāfi‘īs ruled that precise date must be specified. Thus, they do not consider valid a deferment until harvest time, some festival with a variable, or any season such as summer or winter etc.²⁵ Their proof is the Messenger of Allāh’s (pbuh) saying: “To a known term of deferment”. In this regard, specifying a vague date would give rise to legal dispute. This opinion is further supported by the saying of ‘Abdullāh b. ‘Abbās: “Do not sell with a deferred term until harvest or threshing time, and do not sell with deferment unless you specify a particular month”.²⁶
- The Mālikīs ruled that *salam* is permissible when its term of deferment is specified as vaguely as the times stated above. In such cases, the specific time of delivery is considered the most likely time for the occurrence of such events, which is usually the middle of the period when its occurrence is possible. Their proof is that such a deferment is to a time that is known by convention, and that cannot vary significantly, thus being equivalent to deferment until the first of the year.²⁷

8. That the genus of the object of sale exists in the market in the specified type and characteristics continuously from the contract time until the delivery time, and where it cannot be imagined to become unavailable (e.g. grains). Thus, if the object of sale does not exist at the time of contract or the time of delivery, or if it becomes unavailable in the interim (e.g. fruits, milk, etc.), then the forward sale is not permitted. In this regard, the ability to deliver the merchandise may be put in doubt if the object is not available at any such time, while its availability in the market establishes its deliverability. In short, this condition is stipulated to guarantee that the object of the forward sale will be delivered.

- Based on this ruling, if the object of a forward sale is restricted to a specific location, then if its existence can be jeopardized by natural causes (e.g. the wheat of a specific village or plot of land), then the forward contract is not permitted. In this case, the deliverability of the merchandise is not certain, which results into *gharar* that is not necessary, thus rendering the contract invalid. However, if there was

²⁵ Ibn Al-Humām ((Hanafi), vol.5, pp.222,336).

²⁶ Al-Zayla‘ī said that Al-Bayhaqī narrated this saying in *Kitāb Al-Ma‘rifah* on the authority of Al-Shāfi‘ī, c.f. Al-Hāfi‘ī Al-Zayla‘ī (1st edition, (Hadith), vol.4, p.21).

²⁷ Al-Bājī Al-‘Andalusī (1st edition (Mālikī), vol.4, p.298), ’Ibn Juzayy ((Mālikī), p.269).

no or, perhaps, a very remote possibility that the object of sale would not exist (e.g. where the object of the forward sale is Iraqi wheat, or Irani wheat, etc.), then the forward contract is permitted, since such merchandise will most probably exist at delivery time, and “most probable” events have the same legal status as ones that are certain. On the other hand, some of the major Hanafi jurists ruled that forward sales are not permitted if the object of sale is defined by as product of a large city or state. Literally, they ruled that such sales are not permitted in this case unless the object of sale is foodstuffs produced in a particular state, since the probability of non-existence of the produce of any smaller unit is non-negligible”. The correct opinion, however, is the one stated earlier.²⁸ Those are the views of the Ḥanafīs.

- The Mālikīs, Shāfi‘īs, and Ḥanbalīs stipulated the condition that the object of sale be generally existent, and very unlikely to vanish, only at the time of delivery, regardless of whether or not it existed at the contract time. In this regard, they argue that what matters is the deliverability of the merchandise, thus only the time of delivery should be considered. Another proof is the tradition that the Prophet (pbuh) arrived to Madīnah and found the merchants trading in fruits with one and many year forward contracts, then said: “Whoever engages in a forward sale, let him specify a known volume or weight, and a known term of deferment”. Thus, he (pbuh) did not make it a condition that the object of sale exist at the time of the forward contract. If such a condition had existed, he (pbuh) would have mentioned it, and he would have forbidden them from engaging in forward sales of term two years, since the fruits will clearly fail to exist in the middle of the year.²⁹ In addition, the Mālikīs stipulated the condition that the liability for the object of forward sale be for a fungible, thus rendering impermissible forward sales in the produce of a specific village or a particular building.³⁰

It is apparent that the inferences made by the non-Ḥanafīs are more compelling and more wide-ranging.³¹ One of the aspects of the Ḥanafi inference is the following: if the time of delivery of the object of a forward sale arrives, and if the object of sale is not available at that time, then the buyer has the option of waiting until it is available, or to void the sale and take back the price.³²

²⁸ Al-Sarakhsī (1st edition (Hanafi), vol.12, p.134), 'Ibn Al-Humām ((Hanafi), vol.5, p.331), Al-Kāsānī ((Hanafi), vol.5, p.211).

²⁹ Al-Baṣīr Al-'Andalusī (1st edition (Mālikī), vol.4, p.300), *Hāshiyat Al-Dusūqī* (vol.3, p.211), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.106), 'Abū-'Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.298), 'Ibn Qudāmah (, vol.4, p.293 onwards), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.79).

³⁰ 'Ibn Juzayy ((Mālikī), p.269).

³¹ ^c*Aqd Al-Bay*^c by Professor Al-Zarqā' (p.120).

³² 'Ibn 'Ābidīn ((Hanafi), vol.4, p.214), ^c*Aqd Al-Bay*^c (ibid.).

9. That the contract is binding, with no condition options for either of the parties to the contract. Thus, if a person engages in a forward sale of one unit of currency in exchange for one measure of wheat, on condition that he has an option for three days, and then if he receives the price and the two parties leave the contract session, the forward contract is rendered defective. In this regard, the permissibility of sales with a conditional option was established against the rule by analogy (*qiyās*) based on the need for such contracts. However, since the ruling was not in accordance with analogy, it cannot be used in a further analogy from regular sales to forward sales. Moreover, there is no need for options in a forward sale, since options are legalized to avoid inequity (*ghubn*), while *salam* is built on inequity and price reduction, thus not being a candidate for the validity of options.

In the above mentioned case, if the two parties of the forward sale agreed to void the option prior to leaving the contract session, and if the price was already in the possession of the seller, then the contract is rendered valid by the majority of Ḥanafīs, while Zufar had the opposite opinion. However, if the price perished, then the contract is not considered valid, since the price in this case was a liability on the seller, and a forward contract cannot be established with a price that is a liability.

We can infer from this condition a subsidiary condition that the price of a forward sale be received during the contract session, since stipulating a condition would have led to a delay in the payment of the price.

Note that the inspection and defect options as they relate to the price of a forward contract do not render the contract defective if the price is a specific fungible or non-fungible item. This follows since the two mentioned options do not prevent ownership of the compensation for this price from being established.

On the other hand, jurists agree that the inspection option is not established for the object of a forward sale, since such an option is not applicable to items that are owned as a liability on another. In this case, there is no benefit to be derived from such an option, since its effect would be the buyer's ability to return the absent merchandise if it does not meet the buyer's expectations. However, the object of a forward sale is not a specific item, but rather a liability that can be replaced by a similar one. Thus, if upon seeing the object the buyer were to return it to the seller, the object of sale returns to its status as a liability on the seller (to be satisfied by another object), and no progress is made. Thus, the description of the object of a forward sale is sufficient for its validity since it plays the role of inspection.

In contrast, the defect option for the object of a forward sale is established in such sales. This follows since such options do not prevent the receipt by means of which the contract is concluded.³³

³³Ibn Al-Humām ((Hanafi), vol.5, p.243), *"Aqd Al-Bay"* by Professor Al-Zarqā' (p.119).

10. The location of delivery must be specified if the object of a forward sale is not easily portable (e.g. wheat or barley). This condition for the permissibility of *salam* is stipulated by 'Abū-Ḥanīfa, in contrast to 'Abū Yūsuf and Muḥammad who do not stipulate it. All three agree that ignorance of the location of delivery renders the *salam* impermissible since it may lead to dispute, but differ over whether or not the specification of the delivery location is made necessary by the difficulty of moving the merchandise.

- In this regard, 'Abū Ḥanīfa ruled that the location of the contract session is not rendered the delivery location by default. Thus, unless the delivery location is specified, it remains unknown and this ignorance may lead to legal disputes over the cost of transportation. In contrast, 'Abū Yūsuf and Muḥammad ruled that the location of the contract session is the default location of delivery, thus eliminating ignorance and rendering the *salam* valid. In this regard, the obligation to deliver stems from the contract, and thus inherits its location by default, in analogy to the sale of a specific non-fungible.

A counter-argument may be phrased as follows: the contract takes place because of its parties, and not its place. Thus, the location of the contract session is the location of the parties to the contract, but not necessarily the location of the contract itself. Thus “the location of the contract” is not necessarily specified.

This difference of opinion is relevant for the specification of the delivery location for the rent in a lease contract if its transportation is costly. 'Abū Ḥanīfa thus ruled that the contract is not valid if the location of rent delivery is not specified. For 'Abū Yūsuf and Muḥammad, on the other hand, the contract is valid, and the location of rent delivery is the same as the location of delivery of the object of lease. Thus, if the leased object were a house or plot of land, then the rent should be delivered there; if the leased object is an animal, then the location of delivery is the point from which the animal began its motion; and if the leased object is a dress sent to a dye house, then the rent is delivered at the same location where the dress is delivered. Note that the delivery location is implicitly specified for 'Abū Yūsuf and Muḥammad at the location of the contract session if delivery at such a location is possible. If it is not (e.g. if the contract session was on a ship or on top of a mountain), then the closest feasible location is specified as the delivery location.

In case the object of a forward sale was easily portable (e.g. jewelry, etc.), there are two narrations of opposite opinions of 'Abū Ḥanīfa : one is that the delivery location is specified by default as the location of the contract session, in accordance with the opinions of 'Abū Yūsuf and Muḥammad. However, the more accepted narrated opinion of the Ḥanafis is that the object should be delivered wherever the two parties meet, and not necessarily at the location of the contract session. In this regard, all locations will be equally good, since the value

of easily portable merchandise does not depend on its location.³⁴

If the parties to the contract did indeed specify a delivery location, then this specification is binding if the object of sale is not easily portable. However, if it is easily portable, then there are two narrated opinions: the first is that this specification of location is not binding, and the seller may deliver the merchandise wherever he wishes; but the second and more correct opinion is that the specification is binding since it saves the buyer the risk of travel.³⁵

- The Mālikīs ruled that it is always better to specify the delivery location as a condition of the forward contract.³⁶
 - The Shāfi‘īs ruled that if the object of a forward sale were to be delivered at an inappropriate delivery location, or one that imposes significant transportation costs, then the specification of delivery must be stipulated as a condition. However, if it were to be delivered to an appropriate location and if it were easily portable, then the specification of the delivery location is not a condition, and convention dictates that the contract session location is the delivery location.³⁷
 - The Ḥanbalīs ruled that the specification of a location of delivery is not a condition for a forward contract, unless the location of the contract was not on a ship or similar location. In case of disagreement, the contract session location is specified by default as the delivery location.³⁸
11. The object of a forward sale must have the same distinguishing characteristics as the price, i.e. that it must be a fungible good, which may thus be established as a liability on the seller. Specifically, the object of sale must be measurable by volume, weight, size, or numbers of homogenous items (e.g. grains, fruits, flour, clothes, cotton, iron, lead, medicines, walnuts, and eggs). In such commodities, the quality and quantity of the objects of sale to be delivered can be specified in a highly accurate manner, thus preventing the potential for legal dispute.
- However, if the objects cannot be accurately described (e.g. non-homogenous items measured by number or size such as homes, buildings, jewelry, leather, wood, parts of edible animals, and large non-homogenous fruits), then they may not be used as objects of forward sales. In such cases, the specification of the genus, type, characteristics, and quantity of the good is not sufficient to eliminate major ignorance that may lead to dispute, due to the vast range of items that fit in this category. The significant differences within such categories lead to significant differences in price and value, and thus the

³⁴ Al-Kāsānī ((Hanafi), vol.5, p.342), Ibn Al-Humām ((Hanafi), vol.5, p.213).

³⁵ Al-Kāsānī ((Hanafi), vol.5, p.342), Ibn ‘Abidīn ((Hanafi), vol.4, p.216 onwards).

³⁶ Ibn Juzayy ((Mālikī), p.270).

³⁷ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.104).

³⁸ Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.80).

sale would be among the forbidden sales of unknowns. This is the opinion of the Ḥanafīs. We note, further, that they have permitted forward sales of homogenous countables by any measure (volume, weight, or number). However, for heterogeneous countables, they have rendered forward sales impermissible whether by weight or by number.³⁹

- The Mālikīs ruled that forward sales are valid for objects that can be described sufficiently well. For those objects that cannot be sufficiently well described, the sale is still valid if the buyer specifies items that have known genus, characteristics (as well as weight, volume, size, or number for items thus measured). Thus, they argue that the condition of validity for a forward contract is the ability to control the nature of the object of sale, where such control is determined by convention via weight, volume, size or number. As for homogenous countable items, they rule that forward sales are valid by number, since there is no significant variance among such items.⁴⁰
- The Shāfi‘īs ruled that forward sales are valid if and only if the object of sale can be controlled by description. In the case of homogenous countables, they ruled that they may be sold in a forward contract by volume, weight or size, but not by number since there is some variance among them (in analogy to watermelons). As for non-homogenous countables (e.g. watermelon, eggplant, etc.) they may be forward sold by weight but not volume (due to variance in shape and volume) or number (due to the same variance).⁴¹
- The Ḥanbalīs ruled that forward sales are valid if and only if the object of sale can be controlled by description (e.g. items measured by weight and volume). With respect to non-homogenous countables, there are two types: one type for which the size of the units can be controlled, and can be forward sold by number, and a type that may only be forward sold by weight, as argued by the Shāfi‘īs.⁴²

Thus, the Shāfi‘ī and Ḥanbalī opinions on this matter are similar to those of the Ḥanafīs, with differences only over homogeneous and non-homogenous countables. The Mālikīs, on the other hand, were the only ones to permit forward sales for items that cannot be controlled by description.

³⁹ Al-Sarakhsī (1st edition (Hanafi), vol.12, pp.131,136), Al-Kāsānī ((Hanafi), vol.5, p.208 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, p.324 onwards and 354), 'Ibn 'Abidin ((Hanafi), vol.4, p.213), *Al-Farā'id Al-Bahiyah fī Al-Qawā'id Al-Fiqhiyyah* by Sheikh Maḥmūd Ḥamzah (p.39).

⁴⁰ Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.200), *Hāshiyat Al-Dusūqī* (vol.3, pp.207,215), Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.4, pp.292,294,296).

⁴¹ Abū-'Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, pp.297,299), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.107).

⁴² Ibn Qudāmah (, vol.4, pp.276,288 onwards).

In what follows, I list the legal status of some objects of sale with regards to the possibility of controlling the object by means of description:

6.3.3 Forward sales of animals and their parts

There is a consensus that the fat tails and other fats of animals may be forward sold by weight. However, jurists differed over forward sales of the entire animal:

- The Ḥanafīs ruled that forward sales of animals are categorically not permitted. Their proof is the narration on the authority of 'Ibn ^cAbbās "that the Prophet (pbuh) prohibited forward sales of animals".⁴³ Another proof is the fact that animals are very heterogeneous, and thus their characteristics cannot be controlled sufficiently accurately to determine its fair price, thus leading to potential legal disputes in analogy to the sales of heterogeneous countables.⁴⁴ Thus, forward sales of sheep (which is a common practice) is not valid due to their vast heterogeneity.
- The Mālikīs, Shāfi'īs, and Hanbalīs ruled that forward sales are permissible for animals in analogy (*qiyyās*) to the permissibility of loaning an animal. Muslim narrated that "the Prophet (pbuh) borrowed a young camel".⁴⁵ 'Abū Dāwūd narrated that "the Prophet (pbuh) ordered ^cAbdullāh ibn ^cAmr ibn Al-^cĀṣ (mAbpwh) to buy one camel in exchange for the deferred price of two camels".⁴⁶ This latter transaction is a forward sale (*salam*) and not a loan, since it includes an increase over the merchandise as well as deferment. With regard to the *Hadīth* forbidding forward sales of animals, 'Ibn Al-Sam'ānī said that it is "not established, despite the fact that it was narrated by Al-Ḥākim". However, the validity of forward sales of animals in those three schools is conditioned upon the specification of its genus, age, gender, color, and approximate size.⁴⁷

⁴³Narrated by Al-Ḥākim and Al-Dāraqutnī on the authority of 'Ibn ^cAbbās. Al-Ḥākim judged that its narration chain is valid (*sahīh*), but that it was not narrated by Al-Bukhārī and Muslim. The correct analysis, however, is that its chain of narration contains 'Ishāq ibn 'Ibrāhīm ibn Jūtī, whose narrations are considered weak. 'Ibn Ḥibbān said that this person's narrations are very doubtful; he narrates rejected sayings on the authority of well-accepted narrators, and it is only permitted to list his narrations to express astonishment, c.f. Al-Ḥafiz Al-Zayla'ī (1st edition, (*Hadīth*), vol.4, p.46). 'Ibn Ḥajar (, p.245).

⁴⁴Al-Sarakhsī (1st edition (Hanafi), vol.12, p.131), Al-Kāsānī ((Hanafi), vol.5, p.327 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, p.209).

⁴⁵The chain of narration of this *Hadīth* will be discussed in the section on loans.

⁴⁶Narrated by 'Abū Dāwūd, and Al-Dāraqutnī and Al-Bayhaqī on his authority. Its chain of narration includes 'Ibn 'Ishāq, resulting in differing opinions on its authenticity. However, Al-Bayhaqī also narrated it in *Al-Khilāfiyāt* on the authority of ^cAmr ibn Shu'ayb on the authority of his father and grand father, and rendered it valid (*sahīh*), c.f. 'Ibn Ḥajar (, p.235).

⁴⁷Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.4, p.293), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.200), *Hāshiyat Al-Dusūqī* (vol.3, pp.207,209), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.110), 'Ibn Qudāmah (, vol.4, pp.278,282), Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.72).

6.3.4 Forward sales of meat attached to bones

- 'Abū Ḥanīfa ruled that forward sales of meat attached to bones is not permitted due to excessive ignorance that may lead to legal dispute. Such ignorance may relate to the fatness or leanness of the meat, and the proportion of meat to bones. The better supported of his opinions further renders not permissible the sale of meat that was detached from bones since it still contains ignorance with respect to fatness or leanness. In this regard, he finds that this one type of ignorance is sufficient, since a legal status based on two independent reasons is equally established by only one of them.
- 'Abū Yūsuf and Muḥammad, the Mālikīs, the Shāfi'īs and the Ḥanbalīs all ruled that forward sales of meat are valid provided that its characteristics are controlled for by listing the type of meat (lamb or beef), as well as the characteristics of the animal (gender, whether or not it was castrated, fed or wild, its age, its fatness, the part of the body from which it was taken, and its amount). Their proof is the *Hadīth*: "Whosoever engages in a forward sale, let the contract be in a known volume or weight". The apparent ruling based on this *Hadīth* is the permissibility of sales of all goods measured by weight. Moreover, if forward sales of an animal is permissible, then surely the forward sales of its meat will be more worthy of permissibility.⁴⁸

6.3.5 Forward sales of fish

The majority of jurists treat forward sales of fish the same way they treat forward sales of meat. There are multiple narrations on the opinion of 'Abū Ḥanīfa on this matter, the most accepted in his school is that forward sales of small fish by volume or weight is not permitted. In this regard, fresh and salted small fish are treated equally, since small fish cannot be distinguished in terms of fatness or leanness, or the proportion of bone to meat, as it is possible in meat. As for old fish, the apparent narration is that he permits their sale in any form by weight.⁴⁹

6.3.6 Forward sales of clothes

Clothes are among the heterogeneous countable goods for which the Ḥanafīs ruled by analogy that forward sales are not permissible, based on the vast heterogeneity. Forward sales of clothes can be permitted based on juristic approbation (*'istīḥsān*) only if the genus and type are specified, as well as the thickness of the cloth, and its size. In such a case, clothes are treated in the same manner

⁴⁸ Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.200), *Hāshiyat Al-Dusūqī* (vol.3, pp.207,209), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.111 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.298), 'Ibn Qudāmah (, vol.3, p.280), Marī ibn Yūsuf (1st printing ((Hanbalī)), vol.2, p.71).

⁴⁹ Al-Sarakhsī (1st edition (Hanafi), vol.12, p.138), 'Ibn Al-Humām ((Hanafi), vol.5, p.211), Al-Kāsānī ((Hanafi), vol.5, p.333), 'Ibn 'Abidīn ((Hanafi), vol.4, p.213).

as homogeneous goods due to the need and customary practice of people to deal in them with forward contracts.

However, if the dress is made of silk, the masters of the school have disagreed regarding the specification of its weight. The best accepted opinion is the requirement that its weight be specified, since it is part of what is desired in the dress, and since the value of silk is determined by its weight.⁵⁰

The Mālikīs, Shāfi‘īs, and Ḥanbalīs permitted the forward sales of clothes as we noted earlier.⁵¹ Ibn Al-Mundhir reported that they all agreed on the permissibility of forward sales of clothes.⁵²

6.3.7 Forward sales of hay

The Ḥanafīs ruled that forward sales of straw or hay by bunches or volumes is not permitted, due to significant heterogeneity between two bunches. However, they ruled that its forward sale by weight is permitted. The same ruling applies to wood, which may not be forward sold by volume, but may be by weight.⁵³

6.3.8 Forward sales of bread

There is agreement that forward sales of bread by the number of loaves is not permitted due to extreme heterogeneity between loaves. Moreover, Al-Karkhī ruled that forward sales of bread by weight is not permissible either, due to extreme heterogeneity between baked and unbaked bread in weight. Thus, ignorance that may lead to legal dispute persists even if it is forward sold by weight.

It is reported in the *Nawādir* of 'Ibn Rustum that such sales are not permitted in the opinion of 'Abū Ḥanīfa and Muḥammad, and that is also the position of the Shāfi‘īs. This ruling is based on the fact that it is difficult to control the characteristics of the bread to be delivered due to the great variance in its characteristics caused by its varying exposure to fire. However, 'Abū Yūsuf permits the forward sales of bread if specific type, weight, and term of deferment are stipulated.⁵⁴

The Mālikīs and Ḥanbalīs ruled that forward sales of bread, and similar goods that can be controlled and that are exposed to fire, are valid. Their proof is that the apparent meaning of the *Hadīth*: “Whoever engages in a forward contract, let him contract over a known volume or weight” is the permission of forward sales for all goods measured by volume, weight, or number. In this regard, the effect of exposure to fire is known by custom, and can be controlled by the degree of moisture of the bread, thus permitting forward sales.⁵⁵

⁵⁰ Al-Sarakhsī (1st edition (Hanafi), vol.12, p.133), Al-Kāsānī ((Hanafi), vol.5, p.353), 'Ibn Al-Humām ((Hanafi), vol.5, p.209).

⁵¹ Ibn Juzayy ((Mālikī), p.269), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.107), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.72).

⁵² Ibn Qudāmah (, vol.4, p.276).

⁵³ Al-Sarakhsī (1st edition (Hanafi), vol.12, p.141), 'Ibn Al-Humām ((Hanafi), vol.5, p.209).

⁵⁴ Ibn Al-Humām ((Hanafi), vol.5, p.211), 'Abū-'Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.297).

⁵⁵ Ibn Qudāmah (, vol.4, p.277), Al-Sha‘arānī ((Shāfi‘ī), vol.2, p.74).

6.3.9 Lending bread

- 'Abū Ḥanīfa ruled that it is not permissible to lend or borrow bread by weight or number, in analogy to forward sales. In contrast, 'Abū Yūsuf permitted lending bread by weight, but not by number, also in analogy to his ruling on forward sales of bread. Muhammad, on the other hand, permitted lending bread by number or weight based on meeting the needs of people and acceptance of convention, even if the bread is not homogeneous. The latest opinion is the accepted one in the Hanafi school based on customary practice and need.⁵⁶
- The Mālikīs ruled that lending bread is permitted by number or weight to meet peoples need, and since loaves are sufficiently homogeneous to permit lending by number.⁵⁷
- The more accepted opinion among the Shāfi'īs and Ḥanbalīs is the permissibility of lending bread by number or weight, based on the commonality of this practice across times and countries.⁵⁸ *Ā'ishah* (mAbpwh) narrated: "I said: 'Oh Messenger of Allāh, people borrow bread and yeast from their neighbors, and they return more or less, is this permissible?' He (pbuh) said: 'there is no harm in this; it is a common practice of the people, and the increase or diminution is not what they intend'."⁵⁹

6.3.10 Shāfi'ī conditions for forward sales

I summarize here the conditions of forward sales (*salam*) in the Shāfi'ī school to contrast them with the Ḥanafi conditions:

1. The conditions pertaining to the parties of a forward sale are the same as the conditions for a regular sale contract (being of legal age, sanity, discernment, and freedom of choice). However, forward sales are permitted for a blind person, since the object of the forward sale is established as a liability on the seller determined by description (*mawsūf fī al-dhimmah*). This is in contrast to their ruling of invalidity of a regular purchase by a blind person due to their requirement of inspection (viewing) of the object of sale.
2. The conditions pertaining to the language of a forward sale are the same as those for a regular sale (unity of the contract session, correspondence of

⁵⁶ Al-Samarqandī ((Hanafi), vol.2, p.19), 'Ibn Ā'Abidīn ((Hanafi), vol.4, p.195), Al-Kāsānī ((Hanafi), vol.5, p.299).

⁵⁷ *Hāshiyat Al-Dusūqī* (vol.3, p.222).

⁵⁸ 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.304), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.119), 'Ibn Qudāmah (, vol.4, p.319).

⁵⁹ Narrated by 'Abū Bakr Al-Shāfi'ī on the authority of *Ā'ishah* (mAbpwh), and also on the authority of Mu'ādh ibn Jabal that "He (pbuh) was asked about the borrowing and lending of bread and yeast. He (pbuh) said: 'Glory be to Allāh, this is indeed one of the best character traits of mankind, so take the larger amount and give the smaller, or take the smaller and give the bigger, the best among you is the one who is best in paying back his debts.' I heard the Messenger of Allāh (pbuh) say that", c.f. 'Ibn Qudāmah (, vol.4, p.319).

the offer and acceptance), and they add the condition that the language of the forward contract explicitly uses the term for “forward payment” (*salam* or *salaf*), and render the contract invalid if it does not use this language. They also make it a condition that the contract is void of conditional options that would delay the payment of the price in the forward contract, which is forbidden in *salam*.

3. The price must be known to both parties in quantity and description, and it must be delivered during the contract session prior to the physical parting of the parties of the contract, to prevent a [forbidden] trade of one debt for another.
4. There are seven conditions for the object of a forward sale:
 - (a) That its characteristics can be controlled by a description that would negate any ignorance, and that the degree of heterogeneity in this good is minor.
 - (b) That its genus, kind, amount, and characteristics are known to both parties.
 - (c) That it is not a mixture of different genera (e.g. wheat and barley, etc.).
 - (d) That the object of sale is a fungible established by description as a liability on the seller. Thus, if the object of a forward sale is specified to the point of being non-fungible (i.e. it becomes a *ayn*), then the forward sale is not valid.
 - (e) That it is deliverable according to the specified description at the specified time. Thus, the object of a forward sale may not be replaced by another good (e.g. delivering wheat instead of fat, or iron in place of clothes, etc.). Consequently, forward sales are invalid if the object of the forward sale is usually non-existent at the specified delivery time (e.g. fresh grapes in the winter time).
 - (f) That the term of deferment, i.e. the time of delivery, is specified precisely. Thus, forward sales for an unknown term or without the specification of a specific term (e.g. when so-and-so returns, or at harvest time, etc.) are invalid.
 - (g) If the location of the contract is not eligible as a place of delivery of the object of forward sale, or if the object is not easily mobile, then the location of delivery of the object of sale is necessary for the validity of the contract.

6.4 Legal status of forward sales

The legal consequence of a forward sale is the establishment of deferred ownership of the object of sale to the buyer, in exchange for the establishment of

immediate ownership of the specific price (or one established by description as a liability on the buyer) to the seller. This contract was permitted as a special license (*rukhsah*) to meet people's needs. However, it has a number of extra conditions for its validity, which are not conditions for regular sales, and that we have listed above.

6.5 Differences between forward and regular sales

The special conditions imposed on forward sales result in a number of differences between this type of contract and a standard sales contract:

6.5.1 Exchange during the contract session

Exchanging the price of a forward sale for another good of a different genus prior to its receipt was ruled impermissible by the Hanafis. This is in contrast to the price in a regular sale, which may be exchanged if it is fungible. The difference between the two cases is the fact that receipt of the price is one of the conditions of a forward sale. In this regard, exchanging the price of a forward sale for other goods in effect results in non-receipt of the price named in the contract. In contrast, the immediate receipt of the price is not a condition for a regular sale, and thus a replacement may play the same role as the named price. This ruling also applies to the currency exchange contract, where immediate receipt of the two exchanged items is a condition, and neither may thus be replaced by another good.

The Hanafis also ruled with the impermissibility of the exchange of different goods for the object of a forward sale prior to receipt, in analogy to the sale of a mobile non-fungible good. In this regard, while the object of a forward sale is fungible, it is mobile, and the sale of a mobile object of sale prior to receipt is impermissible.⁶⁰

If a forward sale is voided or revoked by the contracting parties, it is not permissible for the seller to exchange the price of the forward sale (which he now holds) for other goods. In other words, the buyer in the forward sale may not replace the original contract with a purchase of goods with the same price he paid in advance in the *salam*. 'Abū Ḥanīfa, 'Abū Yūsuf, and Muḥammad all agreed on this opinion based on juristic approbation ('*istihsān*).⁶¹ Their proof is the *Hadīth* of the Prophet (pbuh): "Do not take a replacement in lieu of your

⁶⁰ Ibn Al-Humām ((Hanafī), vol.5, p.203).

⁶¹ Mālik ruled that this practice is impermissible only if the object of the forward sales was foodstuffs, based on the prohibition by the Messenger of Allāh (pbuh) of selling foodstuffs prior to their receipt, c.f. 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.205). Al-Shāfi'ī, and in one of the opinions reported on behalf of 'Aḥmad, permitted this sale, since the forward buyer has regained ownership of the price through the revocation, thus establishing that price as a liability on the forward seller, who is exonerated from the liability to deliver the object of the forward sale. Thus, they argue, the buyer can use this price to buy whatever he wishes from whomsoever he wishes, c.f. Al-Shāfi'ī (, vol.3, p.117), 'Ibn Qudāmah (, vol.4, p.304).

object or price of a forward sale”,⁶² Another proof is derived from the fact that revocation is a new sale that includes rights for a third party other than the buyer and seller, where the third party in this case is the Law itself. In this new sale, the price is the object of sale, and thus there is a similarity between the price and the object of sale. Since – as a general rule – the object of sale may not be resold prior to receipt, the same applies to other items that are similar to the object of sale.

Reasoning by analogy would render the exchange of the price after revocation or voiding of the forward sale permissible, whether the price were fungible or non-fungible. This is the ruling of Zufar, since the price after the revocation is established as a liability on the forward seller. Thus, such an exchange becomes permissible in analogy to the exchange of other liabilities. This opinion is refuted by the *Hadīth* and logical arguments listed in the previous paragraph.⁶³

The Ḥanafī jurists agreed that replacing one of the two sides of a currency exchange contract by another good, prior to receipt and after revocation, is permissible. In this regard, the counterpart of the currency to be exchanged cannot be identified by identification (*lā yata^cayyan bi-l-ta^cyīn*). Thus, the two parties may keep what they had agreed on in the currency exchange contract, and exchange replacements prior to departing from the revocation session.

They also agreed that receipt of the price in a forward contract is not a condition for the validity of a revocation of that contract. This follows since the legal status of the revocation contract is not similar to the status of the contract establishing the forward sale in all regards. In this regard, the condition of immediate receipt of the price in a forward contract was established to avoid the forbidden sale of one liability for another. Since the revocation renders object of the forward sale is no longer a liability, the danger of trading one liability for another is no longer present, and immediate receipt is no longer a condition.⁶⁴

In contrast, immediate receipt in currency exchange contracts is a condition for the validity of revocation. In this regard, if we consider the revocation as a new sale – as 'Abū Yūsuf argued – then the reason for requiring receipt is obvious. On the other hand, if we consider the revocation a voiding of the rights of the parties of the contract – as 'Abū Ḥanīfa argued – then it is legally considered to be a sale. In this context, 'Abū Ḥanīfa ruled that revocation is a new sale resulting in rights of parties other than the buyer and seller. Once the revocation is rendered a sale, the price and object of sale must be exchanged to avoid the danger of prohibited trading of one liability for another.⁶⁵

Finally, the Ḥanafī jurists agreed that if the forward sale was defective at its inception, then there is no harm in replacing one or both of its exchanged

⁶²The text of this *Hadīth*, as narrated by Al-Dāraqutnī on the authority of 'Ibn ^cUmar, is: “Whosoever engages in a forward sale, let him not take an item other than the price or the object of his forward sale”, i.e. if the contract is voided. Other narrations exist in 'Abū Dāwid and elsewhere, c.f. Al-Shawkānī (, vol.5, p.227), Al-Ḥāfiẓ Al-Zayla^cī (1st edition, (*Hadīth*), vol.4, p.51).

⁶³Al-Kāsānī ((Hanafi), vol.5, p.346), 'Ibn ^cĀbidīn ((Hanafi), vol.4, p.218 onwards).

⁶⁴Al-Kāsānī ((Hanafi), ibid.), 'Ibn ^cĀbidīn ((Hanafi), vol.4, p.219).

⁶⁵'Ibn Al-Humām ((Hanafi), vol.5, p.308), 'Ibn ^cĀbidīn ((Hanafi), vol.4, pp.219-245).

elements prior to receipt. This follows since the defective forward sale does not have the legal status of a valid forward sale, thus permitting replacement of its exchanges in analogy to other liabilities in fungibles.

Note that other schools of jurisprudence have also agreed with the ruling of impermissibility of replacing the price or object of a forward sale with other goods.⁶⁶

6.5.2 Revocation of part of a forward sale

It is permissible for the forward buyer to take part of his price and part of the object of the forward sale before or at the term of the forward sale, provided that this is done with the consent of the forward seller. The legal status of the sale would thus be a revocation of part of the forward sale, while keeping the rest of the contract in place. This is the ruling of the majority of jurists, based on the argument that taking back the price is a total revocation, which is unanimously permitted in total. Thus, a partial revocation is also permitted, in analogy to sales of non-fungibles. This ruling is based on the more accepted opinion that revocation is a voiding of a previous contract, and is not in itself a sale.

'Imām Mālik and the Judge 'Ibn 'Abī Laylā ruled that such a partial revocation is not permitted, and thus renders the contract defective.⁶⁷ They thus rule that the buyer should recover the rest of the price, based on the *Hadīth*: “Do not take anything other than the object of the forward sale or its price”. Thus, by taking part of each, he would have taken neither. Another proof is that by taking part of the price, he voided the contract, the entire contract.⁶⁸ Thus, the parties of the contract may only choose one of two actions: revoke the entire contract or keep it intact. The majority of jurists refute this argument by asserting that what is meant by the cited *Hadīth* is the prohibition of taking a third good other than the price and object of the forward sale.

There is consensus in the case of regular sales that the two parties may revoke part of the contract and keep the other part. There is also consensus in the case of forward sales that if a forward buyer re-takes the entire price with the consent of the forward seller, if they revoke the entire forward sale, or if they agree to exonerate each other of all liabilities by returning the price to the buyer, then this would constitute a valid revocation. In all such cases, the forward sale would be voided.

It is not permissible for the forward buyer to re-take part of the price prior to the maturity of the term of deferment in order to expedite the rest of the

⁶⁶ 'Ibn Juzayy ((Mālikī), p.269), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.115), Mar‘ī ibn Yūsuf (1st printing (Hanbali), vol.2, p.80).

⁶⁷ This ruling is based on avoidance of potential routes of circumventing the law (*saddān līl-dharrā’c*), since it would allow a legal implementation of the prohibited combination of a sale and loan in one transaction.

⁶⁸ Al-Sarakhsī (1st edition (Hanafi), vol.12, p.130), Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.4, p.302), *Hāshiyat Al-Dusūqī* (vol.3, p.215), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.302), 'Ibn Qudāmah (, vol.4, p.303), Mar‘ī ibn Yūsuf (1st printing (Hanbali), vol.2, p.81), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.103).

forward sale. In this case, 'Abū Ḥanīfa and Muḥammad consider the buyer's behavior a valid revocation of the forward contract, since such a transaction would otherwise be an exchange of goods for time, which constitutes a defective condition. The revocation remains valid, however, since they consider revocation a voiding of a contract, and thus it is not rendered invalid by defective conditions. This is in contrast to sales, where a defective condition (such as the one considered here, which leads to *ribā*), which is affected by defective conditions. As for revocation, which is a voiding of a sale, there is no possibility that it can result in *ribā*.

For 'Abū Yūsuf, the defective condition renders the revocation invalid, thus keeping the entire forward contract intact. This follows since he considers the revocation a new sale, which is thus invalidated by the defective condition, since it may result in *ribā*.⁶⁹ We shall discuss the respective proofs of whether revocation is a voiding or a new sale in more detail in the section on revocation.

6.5.3 Exonerating the buyer of the price

The seller in a forward contract is not permitted to exonerate the buyer of the price without his consent. If the buyer consents, the exoneration is valid, but the forward sale becomes invalid since the exoneration of the price results in non-receipt of that price. However, if the buyer refuses the exoneration, the forward contract remains valid.

In contrast to a regular sale, the seller may exonerate the buyer of the price without his consent, although the buyer retains the right to return the merchandise to him. In this case, exoneration of the price has the effect of a charitable transfer of ownership to the buyer, where the harm done by being a recipient of charity does not require the buyer to return the merchandise.

The crucial difference between forward and regular sales in this regard is that receipt of the price is a condition of validity for forward sales, but not for regular sales. Were it possible for exoneration to be effected without the consent of the other party, it would be possible for the forward contract to be voided without the consent of the other party. However, since one party alone may not void the contract, this invalidates the unaccepted exoneration. This is in contrast to regular sales, where receipt of the price is not a condition, and thus exoneration does not result in voiding the contract.

On the other hand, it is permissible for the buyer in a forward contract to exonerate the seller of his liability for the object of sale, without the consent of the seller. In this case, receipt of the object of the forward sale is not a condition for the validity of that sale, thus validating the exoneration without consent. Legally, the exoneration of a liable party for a liability that is not legally required to be delivered is a pure dropping of the right of the exonerating party. Such a dropping of one's own right is permitted. In contrast, exoneration of the seller in a regular sale for the object of sale is not valid. In this latter context, the

⁶⁹Ibn Al-Humām ((Hanafī), vol.5, p.307), Al-Samarqandī ((Hanafī), vol.2, p.21), 'Ibn Juzayy ((Mālikī), p.270).

object of the regular sale is an identified non-fungible. Since exoneration is a dropping of a right, and dropping the right of ownership of an identified object is illogical.⁷⁰

6.5.4 Bill of exchange (*hawālah*), assumption of responsibility for a liability (*kafālah*), and pawning of the price and object of a forward sale

It is permissible to transfer liability for the price of a forward contract to a present party, and it is also permissible for such a present party to assume responsibility for the price, or have the price pawned. It is also permissible for a present party to engage in all such actions with regards to the object of a forward sale. This is the opinion of the majority of Ḥanafīs, based on the satisfaction of the cornerstone and conditions of the forward sale.

Zufar, on the other hand, permitted such transactions for the object of a forward sale, but not for its price. His proof is that the contracts of transfer of liability, assumption of responsibility, and pawning, were legalized to help ensure a right that may be satisfied after the contract session. However, the payment of the price cannot be delayed till after the contract session in a forward sale, thus eliminating the basis on which such transactions were legalized, rendering them non-valid. A refutation of his opinion is provided by the argument that such transactions ensure receipts for both compensations, and thus is permitted for both equally.

Of course, transfers of liabilities, assuming responsibilities for them, and pawning, are all permitted in regular sales. However, the difference between a regular and a forward sale in this regard comes into effect if the two contractors part prior to receipt, as detailed below:

In a forward contract, the seller must receive the price from the buyer, the party to whom the liability was transferred, or the party who assumed responsibility for that liability; or the pawned object perished prior to parting from the contract session, provided that the value of the pawned object was equal or greater to the price. In the last case, the right of the forward seller is transferred to the value of the pawned object, thus resulting in receipt of the price if the value of the pawned object was at least equal to the price. In this regard, receipt of the pawned object satisfies the obligation of the buyer. Thus, once the pawned object perished, it becomes the responsibility of the one in whose possession it perished, and considering the seller in receipt of the price in this case can thus serve as a compensation for the buyer. If, however, the

⁷⁰Ibn Al-Humām ((Hanafi), vol.5, p.203). This is clarified by the juristic principle that “ownership of identified non-fungibles (*'a^cyān*) cannot be dropped, but may only be transferred”. Thus, if a person drops his ownership of an item, it remains his property. Based on this principle, they ruled that exoneration from liability for a non-fungible item is invalid, since it is a dropping of a right contaminated with ownership. Thus, even if a person has a right to an item deposited with or usurped by another, the first party’s exoneration of the second is invalid, and the item remains in the property of the first, c.f. *Al-Madkhal Al-Fiqhi* by Professor Al-Zarqā’ (p.123).

value of the pawned object was less than the agreed-upon price, the contract is concluded for the value of the pawned object and invalidated for the remainder.

If the forward buyer and seller part prior to receipt, the forward contract is invalidated, even if the parties to whom liability was transferred or who assumed responsibility for the liability remain with the seller. On the other hand, if the latter parties were to leave, while the buyer and seller remain together, the forward contract is not invalidated. Thus, the only relevant information for the validity of the contract is whether or not the buyer and seller parted without receipt, since receipt is one of the rights of the contract, which is built on the buyer and seller.

As for the pawned object, if it does not perish prior to the parting of the buyer and seller, and the latter did not receive the price, then the forward sale is invalidated. In this case, the seller must return the pawned object to the buyer.

All those rulings apply to currency exchange contract in the same manner as they apply to forward sales.

All of the preceding related to the price in a forward sale. As for the object of sale, the seller is exonerated by the transfer of liability contract, and the object of sale becomes a liability on the one to whom the liability was transferred, at the specified term of the forward contract. Thus, the buyer may only demand the object of sale from the person to whom the liability was transferred, and not from the original seller. If a person accepted responsibility for the seller's liability of the object of sale, the buyer has an option whether to demand the goods from the original seller or the one who took responsibility for his liability. Finally, in the case of pawning, if the seller pawned an item with the buyer in support of his liability for the object of sale, the buyer may keep the pawned object until such a time when he receives the object of the forward sale.⁷¹

It is not permitted for the non-Hanafis to transfer liability, assume responsibility for liability, receive exoneration, or pawn an item in lieu of the price, if any of the parties to such legal actions were not present during the contract session.⁷² This follows since receipt of the price is in fact a fundamental condition for the validity of forward sales. The only exception, as we have seen, is the Mālikīs' permission of delaying delivery of the price for three days. The Shāfi‘īs went to the extreme in strictness by not permitting the seller's receipt of the price from the party to whom responsibility was transferred unless the buyer were to receive it first and then give it to the seller. Their argument is that the right attached to the transferred liability becomes a liability on the party to whom it was transferred, and thus if he pays the price, he is paying it on his own behalf and not on behalf of the buyer.

In summary, transferring liability for the object of sale is permitted by the Hanafis and not permitted by the majority of jurists, where the Mālikī restricted the impermissibility to the case of foodstuffs. The majority of jurists allow taking a pawned object or allowing another to assume responsibility for the object

⁷¹ Al-Sarakhsī (1st edition (Hanafi), vol.12, pp.151 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, pp.203 onwards).

⁷² Al-Dardir ((Mālikī)A, vol.3, p.195), Al-Khaṭīb Al-Shirbī ((Shāfi‘ī), vol.2, p.103), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.80), 'Ibn Qudāmah (, vol.4, p.302).

of a forward sale, since such permission is beneficial to the contracting parties. The best accepted opinion among the Ḥanbalis rejects such legal actions, however, based on the *Hadīth* narrated by 'Abū Dāwūd and 'Ibn Mājah on the authority of 'Abū Sa'īd Al-Khudriy: "Whoever engages in a forward contract, let him not transfer it to another".

6.5.5 Receipt of a defective price

If the seller in a forward contract receives the price, and then finds that it contains counterfeit currency, other types of monies that are not legal tender, or any other form of defect, then we consider two cases:

- First, if the buyer agrees with the seller's assessment: then the seller has the right to return the price. In this case, the price may be a non-fungible or a fungible.
 1. If the price is a non-fungible, and was found by the seller to contain the rights of others,⁷³ then if the party with a right to the price allows the sale, it becomes valid, otherwise it is invalid. If the seller finds a defect in the price, then if he accepts the price with the defect, the forward sale is valid, otherwise it is invalid, whether the defect was detected before or after the buyer and seller parted. The reason for invalidating the forward sale in such cases is the negation of receipt of the price due to the rights of others or return due to a defect. Moreover, no other item may replace the price since it becomes an identified non-fungible. Thus, the parties would have parted prior to receipt, which invalidates the forward sale. If, however, the relevant parties permit the contract, then receipt of the price would have indeed taken place prior to parting.⁷⁴
 2. If the price is fungible, and the seller finds it defective after receiving it, then we consider two cases depending on whether the defect is detected during the contract session or afterwards:
 - (a) If he detects the defect during the contract session:
 - i. If the defect is caused by other parties' rights to the price, then the validity of the receipt is suspended pending the permission of those who have such rights. Thus, if those parties permit the receipt, it is permitted, otherwise it is invalid.
 - ii. If the received price is found to be counterfeit monies minted in a different metal (e.g. lead), then the contract is not valid, even if the seller accepted the price. In this case, if the named price is in silver coins and it is paid in lead, then what was received was not of the same genus as the named price, and

⁷³For example if it is owned totally or partially by someone other than the buyer, if it is in a legal trust (*waqf*), etc., c.f. *'Aqd Al-Bayf* by Professor Al-Zarqā'.

⁷⁴Ibn Al-Humām ((Hanafi), vol.5, p.204).

might as well be a completely different good (e.g. clothes). Acceptance of something of a different genus in lieu of the price is not permitted as we have seen above. If, on the other hand, the seller refuses to accept this defective price and exchanges it for an appropriate price, then the contract is permitted, and the previous defective price is ignored.

- iii. If the received price was counterfeit or poor quality coins of the same genus (e.g. silver coins minted by parties other than the financial authority), then the contract is valid if the seller accepts them. In this case, the genus of the price is satisfied, and the defect may be viewed as a lower quality, for which the seller may exonerate the buyer and accept the coins he received as price. Also, if he refuses the defective coins, returns them and receives good coins in their place, then the contract is valid.⁷⁵

(b) If the seller detects the defect after the contract session:

- i. If the defect was caused by the rights of others to the price, then the receipt is again suspended pending the consent of the parties holding such rights. Thus, if those parties agree, the contract is valid, otherwise it is invalid.
- ii. If the price was counterfeit monies minted in a different metal, the forward sale is invalid. In this case, since the paid price was of a genus other than that named in the contract, receipt did not in fact take place prior to parting, which invalidates the forward sale. In this case, receipt of the correct price after the contract session cannot revert the contract to validity after it was rendered invalid.
- iii. If the received price was counterfeit or poor quality coins of the same genus named in the contract, then the forward contract remains valid. In this case, if the seller accepts the coins he thus received, the sale is valid. If he refuses the coins and returns them to the buyer, the Ḥanafī jurists agree that if those coins were not exchanged for good ones during the contract session, then the forward sale is invalidated in proportion to the amount he returned after the session. However, if he replaces the bad coins with good ones during the session, the ruling by analogy is invalidating the forward sale in proportion to the part returned after the contract. This was the ruling accepted by 'Abū Ḥanīfa and Zufar. In this case, the received coins are of the same genus specified in the contract, but not of the same characteristics. This variance in the characteristics establishes the seller's right to return the coins, thus establishing that his right was determined both by the genus and the characteristics of the

⁷⁵Ibn Al-Humām ((Hanafi), vol.5, p.204).

price. In this regard, if either of those components was not satisfied, and if he does not accept what he received, then he had not in fact received his right during the contract session, thus invalidating the forward contract.

On the other hand, the ruling based on juristic approbation is that the forward sale is not invalidated. This is the ruling accepted by 'Abū Yūsuf and Muḥammad. In this regard, they ruled that since the seller received items of the same genus as his right, the receipt is valid. The variance in characteristics is thus viewed as a defect that does not negate the validity of receipt. Therefore, replacing the defective price is permitted in the "return session", which is thus appended to the "contract session".⁷⁶

If part of the receipt price was genuine money, and part was defective money of the same genus, 'Abū Ḥanīfa ruled based on juristic approbation that if the bad coins are exchanged for good in the return session, and if the ratio of defective coins was small, then the contract remains fully intact. He ruled thus since having a few defective coins is difficult to avoid. On the other hand, if the defective portion was large, the contract is invalidated in proportion to the returned defective coins.⁷⁷ There are multiple narrations on 'Abū Ḥanīfa's chosen point of demarcation between small and large proportions of bad coins. The best supported of those narrations is that a third or more is considered large, while less than a third is considered small.⁷⁸

This pertains to the legal status of the received price. As for the object of the forward sale, the buyer has a defect option that he may exercise after receipt if he detects a defect in the merchandise. This follows since the buyer has a right to receive goods without defects.⁷⁹ On the other hand, the inspection and conditional options are not established in a forward sale, as we have seen above.

- **Second, if the buyer denies that the price is defective,** e.g. if the buyer claims that the defective coins shown by the seller were not the ones he delivered to him, while the seller claims that they are, then there are six possibilities depending on whether the seller admitted receipt of some coins and said: (i) I received good ones, (ii) I received my right, (iii) I received the price, (iv) I received all the coins, (v) I received the coins, or (vi) I received, without saying anything else.

1. In the first four cases, his later claim to have received counterfeit coins

⁷⁶Ibn Al-Humām ((Hanafi), vol.5, p.205).

⁷⁷Ibn Al-Humām ((Hanafi), vol.5, p.206).

⁷⁸Al-Samarqandī ((Hanafi), vol.2, p.27).

⁷⁹ibid.

is ignored, and he has no right to demand an oath in the name of Allāh from the buyer that he did not give him the defective coins. In those four cases, his admission of accepting good coins would contradict his later claim. Such a contradiction of claims renders the latter claim invalid, and the requirement to take an oath can only be based on a valid claim.

2. If the seller said “I received the coins”, and then he later said “they are counterfeit”, then the ruling by analogy requires the buyer to claim that the counterfeit coins were not his, with a supporting oath. In such a case, the onus of the proof falls on the seller to establish that the defective coins came from the buyer. Thus, the seller is claiming that the buyer gave him counterfeit coins, while the buyer denies it and provides a supporting oath. In this case, [if the seller fails to provide a proof], the buyer’s denial with the supporting oath has legal precedence.

The ruling according to juristic approbation is that the seller’s claim together with his supporting oath would have legal precedence, and the onus of the proof falls to the buyer. The argument for this opinion is that the seller is in fact denying that his right to a price paid in good coins was satisfied, while the buyer is claiming that that right was indeed satisfied. Thus, the legal precedence would go to the one making the denial (the seller, according to this logic) when supported by his oath, and the onus of the proof falls to the one making the positive claim (the buyer). This opinion also agrees with the ruling by analogy in the first four cases, except that in those cases the seller’s claims contradicted one another, while they don’t in the fifth case, where his claim to have received coins applies to both good and defective ones.

3. If the seller said: “I received” without saying anything more, and then he claims “I found them to be counterfeit”, then his claim has legal precedence, as ruled in the previous case.

In this case, even if he says: “I found them to be lead or silver-plated copper coins”, his claim is accepted. This is contrasted with the case where he says: “I received silver coins”, and then claims that they were lead or silver-plated, in which case his claim is not accepted.

Thus, the statement “I received” includes receipt of anything, including coins made of other metals, and thus does not contradict his later claims.

On the other hand, a claim to have received silver coins would in fact contradict later claims that they are lead or silver-plated copper.⁸⁰

⁸⁰Al-Samarqandī ((Hanafi), vol.2, p.28 onwards). We have copied the text here without further elaboration due to its exhaustive treatment and simple language.

Chapter 7

Commission to Manufacture (*'istisnāc*)

Prologue

Islam is not, never was, and never will be a heavy burden on people in terms of their economic and contractual freedom. On the contrary, Islam has always been responsive to people's needs, permitting and legalizing all transactions that meet legitimate and lawful needs based on justice and fair compensation in their commutative transactions. This responsiveness of Jurisprudence to economic needs is apparent in the methodology of inferring juristic rules and the sources for juristic reasoning. It is also apparent in the reality of juristic inference for specific practical situations.

One of the most prominent examples of this practical tendency is the legality of a number of common contracts as special cases to textual prohibitions and general juristic principles. Such special cases include the forward (*salam*) contract, as well as the commission to manufacture (*'istisnāc*) contract. The permission of those contracts was explicitly inferred by jurists to make it easier for people to meet their lawful economic needs without imposing unnecessary hardship. In this regard, we recall the general principles that "needs are treated as necessities", and "hardship calls for simplification of the rules", for Islām is a religion of ease, not a religion of hardship.

'Istisnāc evolved into Islamic jurisprudence historically due to specific needs in the areas of manual work in the areas of leather products, shoes, carpentry, etc. However, it has grown in the modern era as one of the contracts that make it possible to meet major infrastructure and industrial projects such as the building of ships, airplanes, and various large machinery. Accordingly, the prominence of the commission to manufacture contract has increased with the scope of the financed projects.

Plan of this chapter

The chapter will be divided into three sections, detailed as follows:

1. The first section deals mainly with the legal aspects of *'istisnā'*:
 - (a) The definition of “commission to manufacture” (*'istisnā'*).
 - (b) Is commission to manufacture a promise, or is it a sale?
 - (c) Proof of the legality of the commission to manufacture contract.
 - (d) Conditions that may or may not be appended to the contract, and their effect on its legal status.
 - (e) The legal status and characterization of the commission to manufacture contract.
2. The second subsection deals with the similarities and differences between forward (*salam*) and commission to manufacture (*'istisnā'*) contracts.
 - (a) Commission to manufacture vs. forward contracts.
 - (b) The relationship between the two contracts, and the extent of their similarity.
 - (c) The conditions of the two contracts.
3. The third subsection deals with the positive effect the commission to manufacture contract has on boosting industrial production.

7.1 Commission to manufacture (*'istisnā'*)

7.1.1 Definition

The Arabic term *'istisnā'* lexically means requesting a *san'ah*, where the latter Arabic term refers to the work of a small or large scale manufacturing worker, c.f. definitions in *Al-Miṣbāḥ Al-Munīr*, *Mukhtār Al-Ṣaḥḥāḥ*, and *Al-Qāmūs Al-Muḥīṭ*.

Jurists use this term to refer to the request of manufacturing a specific item in a specific form.¹ Another juristic definition is: “*'istisnā'* is a contract commissioning a worker to manufacture an item that is defined as a liability on him”.² Thus, the commission to manufacture contract is a contract to purchase the item to be manufactured by the worker, where the worker provides both the raw materials as well as the labor to produce the final product specified in the contract. This is to be contrasted with the case where the raw materials are provided by the buyer, in which case the contract is one of employment of the worker's labor, and not commission to manufacture (*'istisnā'*). However, some jurists argued that the object of the contract is only the worker's

¹ Ibn Ḥābīb ((Hanafī), vol.4, p.221).

² *Al-Majallaḥ* (M.124).

work, since commission to manufacture only requests the “manufacture” that is accomplished by the worker.

An example of “commission to manufacture” is thus: A buyer/lessor requests from a worker/seller (e.g. a carpenter, shoe maker, etc.) to manufacture a specific item with specific characteristics (e.g. furniture, etc.) in exchange for a specified price. This contract was traditionally used in instances where custom-production is common (e.g. gloves, shoes, etc.).³

The commission to manufacture contract is concluded through the offer and acceptance of the buyer and seller or manufacturer. The technical Arabic terms are thus: the contract is *'istiṣnāc*, the buyer is called “*mustaṣni*”, the seller “*sāni*”, and the object of sale is called “*maṣnūc*”.⁴

The commission to manufacture contract is similar to forward contracts in three respects: (i) it involves trading an immediate item in exchange for a deferred one, (ii) it is a sale of a non-existent object, and (iii) the object of sale is established as a liability on the seller. However, the two contracts differ in three important aspects: (i) the price need not be paid immediately and (ii) the deferment period need not be specified in the commission to manufacture, and (iii) the object of a commission to manufacture need not be one that customarily exists in markets.

The commission to manufacture contract is also similar in some respects to hiring a worker in exchange for a specified wage. The fundamental difference between the two contracts, however, is that in a commission to manufacture, the seller provides the raw materials, whereas the buyer provides them in the employment contract.

7.1.2 A promise or a sale?

The Ḥanafī jurists differed on their classification of the commission to manufacture contract. Is it a sale? Is it a promise to sale? Is it a form of employing the manufacturer? Is the object of sale the manufactured object, or is it the manufacturer’s work?

Al-Ḥākim Al-Marwazī, Al-Ṣaffār, Muḥammad ibn Salamah, and the author of *Al-Manṭhūr* all ruled that commission to manufacture is a mutual promise, and that it is concluded as a sale at the time of exchange following the completion of the work. Thus, the worker or manufacturer is not obliged to perform the work, in contrast to forward contracts where he is. On the other side, the buyer in a commission to manufacture has the right to reject the object delivered to him, and is not obliged to conclude the transaction.

On the other hand, the more correct and more widely accepted Ḥanafī opinion, is that commission to manufacture is a sale of the object of sale and not a sale of the manufacturer’s work. This opinion thus ruled that the contract is neither a promise to buy, nor is it a wage compensation for work. Thus, if

³Ibn Al-Humām ((Hanafi), vol.5, p.209 onwards).

⁴Ibn Al-Humām ((Hanafi), vol.5, p.2), Al-Kāsānī ((Hanafi), vol.5, p.355), Indian Authors ((Hanafi), vol.4, p.504). Ibn Ḩāfiẓ ((Hanafi), vol.4, p.222), *Aqd Al-Bayc* by Professor Muṣṭafā Al-Zarqā’ (p.122).

the manufacturer were to provide a product that he did not produce himself, or that he had produced according to the contract's specifications but prior to the incidence of the contract, he would have fulfilled his part of the contract. The proof for this position is the fact that Muḥammad ibn Al-Ḥasan mentioned opinions pertaining to commission to manufacture that were based both on analogy (*qiyās*) and on juristic approbation (*'istihṣān*), which do not apply to promises. Moreover, he permitted the contract for commonly traded items to the exclusion of ones that are not traded. Had it been a promise, it would have applied to both types of goods. Moreover, he explicitly called this contract a purchase by saying: "when the commissioner to manufacture (buyer) inspects the goods, he has an option, since he had thus purchased that which he had not inspected". Also, the commissioned to manufacture (seller) owns the price upon its receipt, which would not be the case in a promise.

In this regard, the establishment of options for both parties of the contract does not constitute a proof that it is not a sale, since in an exchange sale (*muqāyadah*) both parties have an option if they had not previously inspected the exchanged goods. The establishment of the inspection option for the commissioner to manufacture is thus one of the characteristics of sale contracts, thus providing a proof that this sale is permitted as a sale not as a promise. Thus, according to this opinion, since the contract is considered a sale, the manufacturer is obliged to perform the task, and the commisioner to manufacture is not allowed to drop his obligation to purchase the manufactured item if it meets the specifications. Such obligations would not be binding for a promise.

Another point of view was championed by 'Abū Sa'īd Al-Barādī^ī, who argued that the object of the commission to manufacture contract is the work involved. His proof is that linguistically, "*'istiṣnā'*" is a request to manufacture or work. However, this opinion is not the most accepted among the Ḥanafis who favor the view that the object of sale is the manufactured item itself and not the work or act of manufacturing it. Thus, they ruled that if the commissioned to manufacture delivers goods that meet the specifications to the satisfaction of the commissioner, the sale is valid, regardless of whether or not the commissioned party or a third party manufactured the goods, and whether or not the goods were manufactured prior to the contract. All such rulings would not apply had the work been the object of sale. Thus, Al-Kāṣānī said: "If performing the work was a condition for the contract, delivering goods that were manufactured prior to the contract would not be permitted; since the condition would apply to future work and not to past work".

The correct opinion is that the object of sale in commission to manufacture is the object to be manufactured, with the stipulated condition of work by the commissioned. This follows since commissioning to manufacture (*'istiṣnā^c*) is a request of the action of manufacturing (*al-ṣun^c*). Thus, if the condition of working to manufacture were not stipulated, the contract would not be called "commission to manufacture". In contrast, if it were considered simply a sale of an item established as a liability on the seller, it would be called a forward sale (*salam*). In this regard, if the commissioned party delivers an item that he had manufactured prior to the contract, and it is accepted by the commissioner, the

transaction is permitted based on a new exchange contract by mutual consent, and not based on the initial contract.⁵

7.1.3 Proof of legality

The Ḥanafī jurists argued that reasoning by analogy (*qiyās*), as well as inference from general juristic principles, would render the contract of commissioning to manufacture (*'istiṣnā'*) impermissible. This follows since it constitutes the sale of a non-existent item (as in the case of *salam*), which is not permitted based on the Prophet's (pbuh) prohibition of selling that which the seller does not have. Thus, it is impermissible as a sale (of a non-existent item), and it is not permissible as an employment of the seller, since the latter works on his own property. The latter arrangement is not permissible, in analogy to the case of a person paying another to carry his own food from one place to another, or paying him to die his own dress a certain color, etc., all of which are not permissible. This is the ruling of Zufar, Mālik, Al-Shāfi‘ī and ’Ahmad, who permit commissioning to manufacture (*'istiṣnā'*) as a forward sale (*salam*), with all the stipulated conditions for the latter contract. The most important such condition is the full delivery of the price in the contract session, with an allowance for one or two days in the Mālikī school. Another condition that they apply to commissioning to manufacture is the specification of the term of deferment, as in the case of *salam*, otherwise they render the contract defective. They further stipulate the condition that the worker is not specified as “the manufacturer”, and the object of sale is not specified as “the manufactured object”. Thus, they render the commissioning to manufacture contract nullified if any of the following three conditions holds: (i) the non-specification of the delivery time, (ii) the specification of the worker, and (iii) the specification of the manufactured object, which renders the object non-fungible and thus cannot be established as a liability on the seller, which is a condition of validity for both *salam* and *'istisnā'*.⁶ The Shāfi‘īs ruled that the contract is valid if it satisfies the above conditions of *salam*, whether or not the term of deferment is specified, since they permit immediate forward sales (*al-salam al-hāll*), by means of which the seller is liable for the object of sale starting from the contract session.⁷

The Ḥanafī jurists, on the other hand, permitted commissioning to manufacture based on juristic approbation (*'istihsān*), due to its common usage in various times without any objections, thus constituting a consensus (*'ijmā'*). They thus base their ruling on the Prophet's (pbuh) saying: “My nation never reaches a wrong consensus”.⁸ This approach was also supported by the state-

⁵ Al-Kāsānī ((Ḥanafī), vol.5, p.355), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.209), 'Ibn 'Abidīn ((Ḥanafī), vol.4, p.222).

⁶ Al-Ḥattāb (1st edition (Mālikī), vol.4, p.539 onwards), Al-Dardīr ((Mālikī)A, vol.3, p.217), Al-Dardīr ((Mālikī)B, vol.3, p.287 onwards).

⁷ Al-Suyūtī ((Shāfi‘ī), p.89), *Al-'Urf wa Al-Sunnah* by Professor 'Ahmad Fahmī 'Abū Sinnah (p.131 onwards).

⁸ Narrated by 'Ahmad in his *Musnad*, Al-Tabarānī in his *Al-Kabīr*, and 'Ibn 'Abī Baṣrah Al-Ghaffārī as a *Hadīth marfū'*: “I asked my Lord that my nation never reaches a wrong consensus, and He granted my request”. 'Ibn Mājah also narrated it as a *Hadīth marfū'* on

ment of 'Ibn Mas'ūd that "Whatever the Muslims view as fair, it is indeed fair in the eye of Allah".⁹

The Messenger of Allāh (pbuh) is reported to have commissioned the manufacture of a ring and a cupping. In the latter case, he paid the copper his wage, despite the fact that the act and frequency of cupping is unregulated, like the amount of water one drinks from a water carrier. Moreover, it is narrated that the Prophet (pbuh) heard of the existence of a public bath, and allowed its usage provided that the men cover their lower bodies. Following this permission, many people including the companions of the Prophet (pbuh) and their followers have continued to use it in that manner, without mentioning the amount of water to be used or the time to be spent in the bath. In this regard, the non-existent object of sale the water delivered by the copper or the manager of the bath may be considered existent for legal purposes.¹⁰

7.1.4 Appended conditions and legal status

The Ḥanafīs stipulated three conditions for the permissibility of commissioning to manufacture, the absence of any of which would render it defective in their view. Thus, if any of those three conditions is violated, the legal status of commissioning to manufacture would be the same as a defective sale, which transfers the ownership by receipt, but only as a tainted ownership that does not allow the new owner to use the object of sale thus acquired. In such cases, the corrupting factors must be removed in respect of the Law. Those three conditions are:¹¹

1. The specification of the genus, type, amount, and characteristics of the object to be manufactured. This follows since the object to be manufactured is an object of sale, which must be known by specifying those aspects. Thus, if any of those aspects of the object of the contract is not specified, the contract would be rendered defective due to ignorance that may lead to legal dispute. Thus, if a person were to commission the manufacturing of a pot, he must specify the type of metal, its genus, its dimensions, its characteristics, and its number (if more than one is to be manufactured). Otherwise, the contract would be considered to contain sufficient ignorance to render it defective.
2. That the object to be manufactured is commonly traded among people (e.g. jewelry, shoes, pots, means of transportation, etc.). Thus, they

the authority of 'Anas: "Indeed my nation never reaches a wrong consensus". There are many other narrations for this *Hadīth*, c.f. Al-Haythamī (, vol.1, p.177; vol.5, p.218), Al-Sakhawī (, p.460).

⁹This is a *Hadīth mawqūf* at 'Ibn Mas'ūd, with other narrated variations. It was narrated by 'Alīmad, Al-Bazzār, and Al-Ṭabarānī in *Al-Kabīr* with a highly trusted chain of narrators. It was also narrated on the authority of 'Ibn 'Abbās; c.f. Al-Ḥāfiẓ Al-Zaylaī (1st edition, (*Hadīth*), vol.4, p.133), Al-Haythamī (, vol.4, p.177), Al-Sakhawī (, p.367).

¹⁰Al-Sarakhsī (1st edition (Hanafi), vol.12, p.138 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, p.209), Al-Kāsānī ((Hanafi), vol.5, p.355).

¹¹Al-Sarakhsī (1st edition (Hanafi), vol.12, p.139), 'Ibn Al-Humām ((Hanafi), vol.5, p.209 onwards), Al-Kāsānī ((Hanafi), vol.5, p.355), 'Ibn 'Abidīn ((Hanafi), vol.4, p.222 onwards).

ruled impermissible commissioning to manufacture a dress or other goods that have not been customarily commissioned to manufacture (e.g. grape juice), which may nonetheless be accomplished through forward sales that satisfy the conditions of that contract. In the latter cases, if the contract is stated as a commissioning to manufacture, but satisfies the conditions of a forward sale, the contract may be rendered defective as a commissioning to manufacture, but valid as a forward sale. In this regard, it is the legal content of the contract that matters, and not its label. Such forward sales would also be valid for non-fungibles such as clothes, rugs, etc. We note in closing that commissioning to manufacture clothes is valid today since it has become customary, and customary practices vary across time and space.

3. That no specific term of deferment is specified. Thus, 'Abū Hanifa ruled that if the parties to the contract specify a term of deferment, the commissioning to manufacture becomes defective and the contract is converted to a forward sale that must satisfy all the other conditions of the latter contract (e.g. full receipt of the price during the contract session, the negation of options if the seller delivers acceptable goods at the term, etc.). His proof is that by specifying a term of deferment, the contracting parties have indeed introduced the notion of a forward sale. In this regard, what matters in contract is their substance and not their labels.

In this ruling, “a term of deferment” is defined as one month or longer. Thus, if a specified term of deferment is less than one month, and if the object of sale is customarily commissioned to manufacture, then the contract is valid. This ruling thus applies if the purpose of specifying a term of deferment was to expedite the delivery rather than to defer it (e.g. if the buyer says “on condition that you finish the object tomorrow or the day after”). However, if the term is specified to defer the delivery of the goods, then the contract is not valid as a commission to manufacture, and it would not be valid as a forward sale if the term is less than one month. In summary, thus, we may conclude that any term of deferment of one month or more would render the contract a forward sale, while a term of less than one month that is mentioned to expedite delivery may render it valid as a commission to manufacture.

'Abū Yūsuf and Muḥammad, on the other hand, ruled that the contract is a commission to manufacture whether or not a term of deferment is specified, since it is customary practice to specify the term in such contracts, thus rendering it a valid condition. This opinion is in agreement with the practical facts of life, and people's needs, and therefore seems more appropriate for implementation.

Item #389 of *Al-Majallah* stated: “Any item that has been customarily commissioned to manufacture is unconditionally a valid object for that contract. A contract to manufacture an item that is not customarily commissioned to manufacture, if it specifies a term of deferment, becomes a

forward sale (*salam*), and the conditions of forward sales must be considered. Such a contract in which the term of deferment is not specified would still be considered a commission to manufacture". In such cases, if the term expires without the object of sale being finished or delivered, then the most common opinion is to offer the commissioner to manufacture a choice between waiting for the object or voiding the contract, which is the same solution in the case of forward sales.¹²

Appended conditions

The Ḥanafīs have agreed that an appended condition is treated in the same manner as included conditions with respect to its legal status, if the condition is valid. If the condition is defective, then 'Abū Ḥanīfa ruled that if appended to the contract, it renders it defective as if it were included in the original contract; but 'Abū Yūsuf and Muḥammad ruled that a defective condition is not appended to the contract, which remains valid. Thus, the latter two consider a defective appended condition nugatory (*laghw*), to protect the validity of the existing contract.

Legal status and characteristics

The legal status of commissioning to manufacture is in fact determined by its consequences, which are:¹³

1. The fundamental legal consequence of commissioning to manufacture is the establishment of the commissioner's ownership of the object to be manufactured, which is defined as a liability on the commissioned party, and the establishment of the commissioned party's ownership of the agreed-upon compensation.
2. The characteristic of this contract is that it is not binding on either party before or after the manufacturing of the object. Thus, each party has the option to fulfill the contract or to void it prior to the commissioner's inspection of the manufactured object. Thus, it is permissible for the manufacturer to sell the object before showing it to the person who commissioned its manufacture, since the contract is not binding, and its object is not the specific manufactured item, but rather an item like it described as a [non-binding] liability on the manufacturer.
3. If the manufacturer delivers the manufactured object to the one who commissioned its manufacture, he would thus have dropped his option through the delivery. Thus, if the buyer inspects the goods and accepts them, the contract is binding on the seller, who has no option.

^{12c} *Aqd Al-Bay*^c by Professor Muṣṭafā Al-Zarqā' (p.123).

¹³ Al-Sarakhsī (1st edition (Ḥanafī), vol.12, p.139), Al-Kāṣānī ((Ḥanafī), vol.5, p.356), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.210), 'Ibn 'Abidīn ((Ḥanafī), vol.4, p.223).

The commissioner to manufacture, on the other hand, has the option after receiving the goods that meet the characteristics specified in the contract. Ownership of the goods are established for him, but are not binding on him. Thus, 'Abū Ḥanīfa and Muḥammad ruled that he had purchased an item that he had not seen, which allows him the inspection option, in contrast to the manufacturer – as seller of that which he had not seen – who has no option at this point.

'Abū Yūsuf, on the other hand, ruled that if the commissioner to manufacturer receives the goods and finds that they satisfy the specified characteristics, then the contract is binding on him. He thus ruled that the object of sale in this case has the same legal status as the object of a forward sale, which does not allow for the inspection option. This would protect the manufacturer from the losses he may incur if no other buyer is willing to buy the items he was commissioned to manufacture, especially if the raw materials used can no longer be used for other purposes. This opinion was questioned on the basis that the potential buyer's loss from eliminating of the inspection option is greater than the potential seller's loss from allowing it, since the manufacturer surely must find another buyer for his merchandise. This line of reasoning is rebutted by asserting that the possibility of another sale is but a hope, and that the more likely loss would befall the manufacturer, thus requiring the ruling that the sale is binding on the buyer.

Thus, *Al-Majallah* adopted the stated opinion of 'Abū Yūsuf, and ruled in #392: "The contract of commissioning to manufacture, once concluded, is binding on both parties. Thus neither party has the right to change his mind, even prior to manufacturing. This ruling is valid since the buyer continues to hold the 'characteristics option' (*khiyār al-wasf*), which he may use if the manufactured object does not meet the terms specified in the contract".¹⁴

In my opinion, the opinion stated in *Al-Majallah* is very valid, since it prevents legal disputes between the contracting parties while protecting the manufacturer from potential losses in the likely event that he fails to sell the goods to another party. This opinion is also in agreement with the general legal notion of the binding power of contracts, as well as contemporary needs to commission the manufacture of major goods such as ships and airplanes, in which cases it is not logical to make the commissioning to manufacture non-binding.

4. The commissioner to manufacture has no right to the manufactured item prior to its delivery by the manufacturer. Thus, the manufacturer has the right to sell the item to a third party prior to showing it to the commissioner to manufacture, as stated before.

¹⁴The text of this item is thus: "If the commissioning to manufacture contract is concluded, then neither party may change his mind; then if the manufactured object does not meet the specified characteristics, the commissioner to manufacture retains his option".

7.2 Commissioning to manufacture vs. forward sales

We have seen that commissioning to manufacture is a contract between the buyer and the worker, where the latter provides the raw materials. The condition of this contract is the specification of the object to be manufactured with sufficient accuracy to remove ignorance.

Forward sales, on the other hand, are exchanges of an immediate price for a deferred object of sale, where the latter is established by description as a liability on the forward seller. The object of the forward sale does not exist at the contract session, and its delivery is deferred to a definite future time period.

7.2.1 Similarities and differences

Both contracts involve sales of non-existing items, permitted to meet economic needs, and based on common practice. The motivation for forward sales is the seller's need for immediate funds to spend for his family sustenance as well as to help him with his production (e.g. to buy seeds and fertilizer). Commission to manufacture, on the other hand, is a commercial contract that results in profits for the manufacturer, while meeting the needs of the commissioner to manufacture. Thus, the motivating need for this contract is the need of the buyer rather than the seller.

There are other differences between the two contracts, which I summarize below:

1. The object of a forward sale is a liability on the seller, and thus must be a fungible measured by volume, weight, length, or number of approximately homogeneous items. In contrast, the object of sale in a commission to manufacture is non-fungible (*'ayn*, which can be identified by identification, such as pieces of furniture, shoes, etc.) as opposed to a fungible liability.
2. Deferment is a condition in forward sales, since it is not permitted for the majority of non-Shāfi'i jurists for a term of deferment less than one month. This is in contrast to commissioning to manufacture, where 'Abū Ḥanīfa has ruled that the specification of a term of deferment converts it into a forward sale. Another difference he highlighted is the ruling that there is no conditional option in forward sales.

On the other hand, 'Abū Yūsuf and Muhammad ruled that commissioning to manufacture is valid whether or not a term of deferment is specified, since – as we have discussed – such specification is customary. Also, the Shāfi'iis have permitted immediate forward sales, in disagreement with the other schools of jurisprudence.

3. The forward contract is binding on both parties, and may only be voided by mutual agreement. In contrast, commissioning to manufacture is not

binding, and may be voided by either party. Also, if the manufacturer delivers the manufactured object to the commissioner to manufacture, he loses his option, but the buyer retains his.

4. A condition of forward sales is the delivery of the price in full during the contract session. This is not a condition in commissioning to manufacture, where people usually pay a downpayment equal to half or one-third of the price, following the Ḥanbalī school's ruling. This difference is the most important one from a practical viewpoint.

7.2.2 Conditions of both contracts

Both contracts require full knowledge of the price in terms of genus, type, amount, and characteristics, otherwise the contract would be considered defective due to ignorance. On the other hand, only the forward contract requires full payment and receipt of the price during the contract session, prior to the physical parting of the buyer and seller. 'Imām Mālik allowed a deferment of the price payment for up to three days, ruling that a payment within three days is legally equivalent to an immediate payment, since anything approximately equivalent to another inherits its legal status. In contrast, advance payment of the price is not a requirement of the commission to manufacture contract, where the common practice is a partial advance payment during or shortly after the contract session, with full payment only at the time of delivery.

In both contracts, the object of sale (to be delivered or manufactured, respectively) must be well known to the buyer and seller in terms of its genus, type, amount, and characteristics. Thus, in both contracts, the object to be delivered is considered an object of sale, which must be fully known to the contracting parties.

Both contracts may not include direct *ribā*, for instance through the unity of genus for the price and object of sale (e.g. wheat for wheat, etc.) with an increase in one of the two compensations (*ribā al-fadl*), or with deferment and increase (*ribā al-nasi'ah*). The commodities for which such trading is forbidden are the six from the above-cited *Hadīth* (gold, silver, wheat, barley, dates, and salt), and ones that can be inferred to carry the same legal restriction.

Moreover, the conditional option is not established in forward sales, thus the contract must be binding on both parties. In contrast, commission to manufacture is not a binding contract, thus establishing options prior to the work or manufacturing (as well as after manufacturing, in the opinions of 'Abū Ḥanīfa and Muḥammad, while 'Abū Yūsuf rendered it binding after manufacturing and consent of the buyer).

On the other hand, the inspection and defect options are both established for the price of a forward sale if it is a fungible or non-fungible identified object. On the other hand, the Hanafis have agreed that the inspection option is not established for forward sales, to prevent the object from returning as a liability on the seller. However, the defect option is indeed established, since it does not prevent the buyer from receiving the merchandise, thus concluding the contract.

'Abū Ḥanīfa ruled that Both contracts require a clarification of the location of delivery of the object of sale if transportation of the object is costly. 'Abū Yūsuf and Muḥammad, on the other hand, ruled that the location of the contract session is the default delivery location.

The Ḥanafīs further stipulate the condition that the genus of the object of a forward sale must be very likely to exist in the markets in the specified type and characteristics throughout the period between the time of the contract and the time of delivery (e.g. grains). However, this is not a condition for commission to manufacture. Note, on the other hand that the condition of existence of the goods in the market is not stipulated by the non-Ḥanafī schools of jurisprudence, being satisfied by the likelihood of existence of the genus of the object of sale at the stipulated delivery time.

The Ḥanafīs, Shāfi'īs, and Ḥanbalīs stipulated a condition for controlling the object of sale, by requiring that it be fungible (i.e. measured by volume, weight, size, or number of homogenous items; e.g. cloths, metals, etc.). Thus, forward sales are not permissible for items that may not be controlled through a description, e.g. houses, buildings, jewels, etc., due to great heterogeneity of their values. In contrast, commissioning to manufacture is valid in any goods for which people customarily use the contract. Note, however, that the Mālikīs rendered as valid forward sales in goods that cannot be controlled by a priori description, and the Ḥanafīs have also permitted forward sales of some non-fungibles such as rugs, clothes, etc. Also, the jurists permitted forward sales of bricks if the buyer stipulates a specific brick factory, since that would make the bricks sufficiently homogenous to be forward sold by number.

Forward sales are permitted for the above-mentioned classes of goods regardless of whether or not the contract is customarily used for those goods. However, commission to manufacture is regulated by restriction to the goods in which its use is customary. For instance, a contract in which a tailor is responsible to sew a fabric that he had himself weaved is not permitted since this practice is unconventional. This follows since reasoning by analogy renders commissioning to manufacture impermissible, and it is only permitted based on its customary usage. Thus, it is restricted to those goods in which its use is customary, and reasoning by analogy remains the measuring tool for other goods. However, it must be noted that customary usage of a contract varies by time and space, thus restricting the applicability of this principle.

7.3 The positive role of commissioning to manufacture

Past utilization of the commissioning to manufacture contract has played a historical role in encouraging production and innovation of the industrial sector in Islamic societies. This contract has also proved to be a very useful tool in meeting the ever changing needs of users of industrial products.

More recently, the commissioning to manufacture contract has seen signif-

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icant growth of usage beyond its humble beginnings in artisan production of shoes, furniture, safes, etc. It has now become a vital tool for financing advanced industrial production of airplanes, ships, cars, trains, etc., thus encouraging the growth of large scale as well as small scale industrial production. This growth has, in turn, been a vital force in improving the standards of living for members of the society.

The uses of this contract have not been restricted to the traditional industrial production, but has also extended to the construction sector, thus providing an important tool in solving a serious problem in many Muslim countries. Thus, one of the main uses of commissioning to manufacture has been the sale of houses and apartments according to agreed-upon characteristics and lots of land detailed on a map. The large implementation of such housing projects would not have been possible without the utilization of binding promises to purchase the real estate thus commissioned to be built. In this regard, once a permission to build is obtained, the lots of land are carefully specified on a map, and the characteristics of proposed building are clearly specified, the commissioning to manufacture (build) becomes valid since there is no room left for potential legal disputes.

This application of the contract has become widely available for usage due to the ease with which the building specifications can be controlled and regulated. In most cases, the price is paid according to a specified schedule of installments. Those installments are applied towards the price of real estate, and therefore are exempt from Zakāh, unless the contract is voided. While delivery time of the homes thus built is commonly specified in the contract, it is mentioned to ensure that the building process is expedited and completed as quickly as possible given the well-known impediments that may be faced by the builders during the lifetime of the project. Clearly, this building activity would be very difficult to validate under the category of forward sale (*salam*) contracts, since that legal form would require full payment of the price at the contract session, which may not be possible for many potential buyers. Moreover, since the State commonly recognizes sales of real estate on lots of land described on a map to be binding, the employment of commissioning to manufacture has proved to be an ideal legal conduit to finance such building projects.

As for penalties that may be levied on a contractor if he is late in finishing and delivering the buildings that he was commissioned to build, such penalties are indeed legally permitted. Such financial penalties fall under the category of “penalty conditions” (*al-sharṭ al-jazā’i*), which was approved by Judge Shurayḥ and supported by the supreme jurists of Saudi Arabia in the year 1394 after Hijra. Judge Sharīḥ said: “Whoever willingly, and without coercion, imposes upon himself a condition, that condition is binding upon him”.¹⁵

¹⁵Ibn Qayyim Al-Jawziyyah ((Hanbali), vol.3, p.400).

Chapter 8

Currency Exchange (*sarf*)

Definition

The legal definition of the currency exchange (*sarf*) contract is: the exchange of one monetary form for another in the same or different genera, i.e. gold for gold coins, silver for silver, gold for silver, silver for gold, etc., whether it is in the form of jewelry or minted coins.¹ Such trading is permitted since the Prophet (pbuh) permitted the exchange of properties for which *ribā* applies hand-to-hand in equal quantities in the same genus, or with differences in quantities in different genera.

Conditions

There are four general conditions for the currency exchange contract: (1) mutual receipt prior to the contracting parties' parting, (2) equality of quantities if monies of the same genus are traded, (3) inapplicability of options, and (4) non-deferment. We now discuss those four conditions in some more detail:

1. Mutual receipt prior to the physical parting of the two contracting parties is postulated as a condition to avoid the danger of effecting the forbidden *ribā al-nasī'ah*. This follows from the Saying of the Prophet (pbuh): "Gold for gold, in equal amounts, hand-to-hand; and silver for silver, in equal amounts, hand-to-hand",² as well as his (pbuh) saying: "Do not trade one

¹ Al-Kāsānī ((Hanafī), vol.5, pp.284-368), 'Ibn Al-Humām ((Hanafī), vol.5, p.215), 'Ibn Ḩābidīn ((Hanafī), vol.4, p.244). The Ḥanbalīs and Shāfi'īs also defined it thus, c.f. Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.3, p.25), Marṣāt ibn Yūsuf (1st printing (Hanbalī), vol.2, p.59), while the Mālikīs distinguished between *sarf* and *murātalah*, where the former refers to exchanging one type of money for another type, while the latter refers to exchanging money for money of the same type, c.f. *Hāshiyat Al-Dusūqī* (vol.3, p.2).

²Narrated by the major narrators with the exception of Al-Bukhārī on the authority of Ḩubādah ibn al-Ṣāmit: "Gold for gold, silver to silver, wheat for wheat, barley for barley, dates for dates, and salt for salt, in equal amounts, hand-to-hand; and if the genera differ [in an exchange], then trade as you wish provided it is hand-to-hand", c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.4).

of them absent (thus, deferred) for the other immediately delivered".³

Thus, if the contracting parties were to part prior to receipt of one or both compensations, the contract is considered defective by the Ḥanafīs, and invalid by the other schools of jurisprudence, since the condition of receipt would be violated. Once the condition is violated, the contract would in effect become a trade of deferred liabilities, or debt for debt, rendering it *ribā*, especially if the two quantities thus traded were not equal.⁴ In this respect, mutual receipt is a condition regardless of whether the two compensations are of the same or different genera.

Physical parting of the contracting parties refers to moving away from the contract session location in different directions, or the movement of one away from the contract location while the other remains there. Thus, if both parties remain in the same place of the contract session, no parting would have taken place, regardless of the length of their stay physically in that place. This applies even if one or both parties were to sleep or faint at the place of the contract session, or if they were to move together in the same direction for any distance. Thus, "physical parting of the contracting parties" is to be interpreted literally in this case.⁵

2. If a money is exchanged for another money of the same genus (e.g. gold for gold or silver for silver), then the two compensations must be equal in weight, even if one of the two compensations is of a higher quality or workmanship than the other. This follows from the above referenced *Hadīth* "gold for gold in equal amounts,...". Thus, the quantity of gold (measured by weight) is the only consideration, irrespective of the quality, following the juristic principle that "its high quality and low quality are equivalent".⁶
3. The currency exchange contract is binding, i.e. devoid of any conditional options, since mutual receipt is a condition of the contract. Thus, since a conditional option would prevent the establishment of final ownership, as we saw previously, it would violate the condition of receipt, thus rendering the contract defective. However, if the person with the stipulated

³One narration of this *Hadīth* in Mālik's *Muwaṭṭa'* on the authority of ʿUmar (mAbpwh) is thus: "Do not trade gold for gold except in equal quantities, and do not trade silver for gold where one is absent and the other immediately delivered". Also narrated by ʿAhmad, Al-Bukhārī and Muslim on the authority of ʿAbū Saʿid Al-Khudriy thus: "Do not trade gold for gold except in equal quantities with no increase in one over the other; do not trade silver for silver except in equal quantities with no increase in one over the other; and do not trade either of them when one side of the transaction is absent and the other immediately delivered", c.f. Al-Ḥāfiẓ Al-Zaylaqī (1st edition, (*Hadīth*), vol.4, p.56), Al-Shawkānī (, vol.5, p.190).

⁴ibid., Al-Kāsānī ((Hanafi), vol.5, pp.369-371).

⁵Ibn Al-Humām ((Hanafi), vol.5, p.215).

⁶Al-Zaylaqī found this a *Hadīth għarīb*, while its meaning is derived from the *Hadīth* narrated by Muslim on the authority of ʿAbū Saʿid Al-Khudriy: "gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt, in equal quantities, hand-to-hand, and whoever increases one of the two compensations would commit *ribā*; the taker and the giver equivalently", c.f. Al-Ḥāfiẓ Al-Zaylaqī (1st edition, (*Hadīth*), vol.4, p.36).

conditional option drops it prior to parting, thus the two parties leave the contract session with final receipt, the contract would revert to be valid. This is in contrast to the opinion of Zufar who did not allow the reversion of the contract to validity. However, it is a consensus that if the condition were to remain after parting, then the contract is rendered defective.

However, the inspection and defect options are established, since they do not prevent the establishment of ownership and thus do not prevent complete receipt. Even if the two parties were to part after receipt, the contract would be concluded for the likes of the exchanged monies and not the exact same ones that changed hands, thus rendering the inspection and defect options effective.⁷

4. A fundamental condition of the currency exchange contract is the absence of any deferment, otherwise the contract would be defective. This follows immediately from the requirement of mutual receipt prior to parting, as discussed above, since deferment prevents immediate receipt, thus rendering the contract defective. However, if the party with the stipulated right to defer delivery of his part were to void the deferment clause and deliver his obligation prior to parting, then the contract reverts to be valid for the Hanafis other than Zufar.

We note that the last two conditions can be subsumed under the condition of mutual receipt, which is in turn a requirement in exchanging goods eligible for *ribā* (*al=’amwāl al-ribawiyyah*). Note moreover, that the Mālikīs and others did not permit the use of legal proxy (*wakālah*) in receiving one of the exchanged monies in this contract, or – in the best supported opinion – such a receipt through a debt transfer (*’ihālah*), if such receipt would likely take place in the absence of the original party to the contract. They ruled for the impermissibility of such legal actions due to the potential of effective deferment of receipt if the original party were indeed absent.⁸ The legal proof for the condition of non-deferment is the number of *Hadīths* of *ribā* listed above, which require hand-to-hand exchange of goods eligible for *riba*, as well as the *Hadīth* narrated by Al-Bukhārī and Muslim on the authority of ’Abū Al-Minhāl: “There is no harm in whatever is exchanged hand-to-hand , but any deferment would render it *riba*”.

8.1 Consequences of the mutual receipt condition

The condition of mutual receipt prior to parting from the contract session results in impermissibility for exoneration, giving as gift, exchanging, or compensation

⁷ Al-Tahāwī ((Hanafi), p.75), Al-Kāsānī ((Hanafi), vol.5, p.367), ’Ibn Al-Humām ((Hanafi), vol.5, p.219), ’Ibn ’Ābidīn ((Hanafi), vol.4, p.246).

⁸ Al-Dardīr ((Mālikī)B, vol.3, p.49 onwards), ’Ibn Juzayy ((Mālikī), p.250).

for one of the traded items in a currency exchange. Those consequences are detailed as follows:⁹

1. Exoneration and gift-giving: if two parties enter a currency-exchange contract of one silver coin for another, then one of them delivers his side of the contract and exonerates the other party for his obligation, or gives it to him as gift or charity, then:
 - If the recipient of exoneration, gift, or charity accepts it, his liability is voided, and the contract is invalidated. In this case, exoneration of his liability would result in non-realization of receipt, which is a condition of the currency exchange contract. Thus, the contract is invalidated since its consequences are not realized.
 - If the exonerated party does not accept it, the exoneration is invalidated, and the currency exchange contract remains intact. The logical chain that results in this ruling is the following: (i) exoneration of a liability would drop it, (ii) that would make receipt of that liability impossible, which (iii) amounts to voiding the currency exchange contract. Since voiding requires mutual consent, it cannot be established by one side alone after the contract is concluded. Thus, once the exoneration is invalidated, the contract remains intact, requiring mutual receipt prior to parting from the contract session.
 - If the exonerating, or donor of a gift or charity party refuses to receive what he exonerated the other party for or what he had given him as gift or charity, then he should be legally forced to receive his compensation. In this case, refusing to take receipt of his compensation would amount to voiding the contract, which is not in his power without the consent of the other party.
2. Exchanging some goods for the specified compensations in a currency exchange contract is not permitted. For instance, if one party were to deliver something other than silver instead of delivering an agreed-upon silver coin, or if he were to sell or give as gift what is due to him in the currency exchange contract prior to receiving that compensation, then his actions are not permissible. In this case, the currency exchange contract remains intact, requiring the receipt of the agreed-upon compensations. Thus, receiving anything in lieu of what was agreed-upon would not constitute the receipt required by the contract, and the requirements of the contract still require satisfaction for the contract to remain valid. In particular, if one of the two compensations was already received, then the other part of the currency exchange must be satisfied by delivering the agreed-upon compensation.

It is permissible for one of the two parties of the contract were to deliver to the other a compensation of the genus of the agreed-upon goods, and it

⁹Ibn Al-Humām ((Hanafi), vol.5, p.218).

was of higher quality, or of lower quality with the agreement of the second party. In this case, the delivery is not considered an exchange of another good for the one agreed-upon, since it is of the same genus. Following the above rule that quality is disregarded in goods eligible for *ribā*, once the recipient drops his right for high quality goods, the receipt is in fact a satisfaction of the first party's liability and not an exchange in lieu of it.

Two practical consequences of this ruling are: (1) if a party accepts a low quality or counterfeit silver coin in lieu of his right for a silver coin, then the transaction is valid. (2) If a party were to trade currencies prior to receiving them in a currency exchange, by telephone or otherwise, then the trade is invalid.

3. Transfer of liability to a third party through a bill of exchange (*hawālah*), assumption of such liability by a third party (*kafālah*), or pawning to the other party the compensation in a currency exchange contract, are all permitted. In all such cases, however, the condition of actual receipt in the cases of transfer of liability and legal proxy, and that of assuming responsibility for potential perishing of the pawned object, must be satisfied. This is agreed upon by all jurists.¹⁰

This is what the Ḥanafī jurists meant by their ruling that if the relevant party received his right in the currency exchange contract from the party to whom liability was transferred, or who assumed that responsibility, or if the pawned object were to perish in the possession of that party during the contract session, the contract is rendered valid as it stands. However, if the two parties were to part prior to complete receipt, or if the pawned object were not to perish, then the contract is invalidated. In this regard, they ruled that “parting from the contract session” refers only to the trading parties, for whom all receipt rights pertain, to the exclusion of the parties to whom liability may have been transferred.

If both parties were to commission legal proxies to perform the currency exchange on their behalf, what is considered again in terms of staying or parting is the session of the original trading parties, and not their legal proxies. This follows from the ruling above that the right of receipt pertains only to the original contracting parties.

Note that all those rulings parallel their counterparts (in terms of transfer or assumption of liability, and pawning) that applied to the price and object of forward sales (*salam*).

4. Mutual cancellation of liability for one of the two exchanges in the currency exchange program or the price in a forward sale must be considered in some detail. The Arabic term for “mutual cancellation or compensation” (*muqāṣṣah*) literally means “similar” or “equivalent”. It was defined by some Mālikis as “two parties canceling out two mutual liabilities”. 'Ibn Juzayy ((Mālikī), p.292) defined it as: “A deduction of one liability or

¹⁰'Ibn Juzayy ((Mālikī), p.250).

debt from another". There are two types of liability clearances: obligatory (*'ijbāriyyah*), and optional (*'ikhtiyariyyah*).

An example of obligatory clearance of liabilities is the case where each of two parties has a liability for the other of the same genus, characteristics, and maturity term. In this case, clearance (*muqāssah*) between them would be effected, thus dropping both liabilities if they are equal in amount, or the larger of the two is reduced by the amount of the smaller. The four conditions of obligatory compensation are:

- (a) That the two parties each have a liability towards the other, known as a correspondence of rights (*talāqi al-haqqayn*).
- (b) Correspondence of the two debts, by having the same genus, type, and characteristics in terms of maturity term, quality, etc.
- (c) That cancellation of all or parts of either debt does not cause any loss to any parties with rights attached to the object for which the party is liable (e.g. a pawn-brokers, debtors, creditors, etc.).
- (d) That cancellation of liabilities does not have illegal effects, such as parting prior to receipt of the price in a forward sale, dealing in a forward-bought item prior to receipt, non-receipt in currency exchange or other goods eligible for *ribā*, which must be exchanged hand-to-hand.

The majority of jurists ruled that obligatory clearance must be implemented if its conditions are met, while the Mālikī jurists did not approve of that ruling.

An example of voluntary clearance of liabilities is when one party is liable to deliver a fungible (*dayn*) to the other, while the latter person is liable to deliver a non-fungible (*'ayn*) to the former. In this case, both parties may agree to drop their right to demand collection of the other's liability. The Mālikīs accept voluntary clearance of liabilities if the two liabilities were of different genera only if it does not lead to a legal infraction. It is well known that all major four schools of jurisprudence consider gold and silver, and similar monies from different metals, to be different genera, thus permitting voluntary clearance of liabilities in the Mālikī schools in this case.¹¹

Note that fiat monies used today, be they paper currencies or coins made purely from gold and silver or metallic alloys, are considered of one genus for the purposes of *muqāssah*. This opinion is based on convention, and following the opinions of 'Ibn 'Abī Laylā and some of the fathers of Ḥanafī jurisprudence.¹²

¹¹See *Al-muqāssah fī Al-Fiqh Al-'Islāmī* by Professor Muhammad S. Madkūr (pp.4,13,23,51,55,77,85,97 onwards), 'Ibn Juzayy ((Mālikī), ibid.), Marṣī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.82).

¹²'Ibn 'Abīdīn said with regard to voluntary liability clearance: "If a depositor has a debt towards the holder of the deposit, and if the debt is of the same genus as the deposit, the

8.2 Debt-Clearance in *sarf* and *salam*

Consider the case of two parties who engage in a currency exchange of one gold coin for ten silver coins. Assume that the first party gave the second the one gold coin, but did not receive the ten silver coins. Assume further that the second party – now liable for the ten silver coins – has a debt on the first for ten silver coins. If the second party demands clearance of mutual liabilities, is such clearance concluded? We need to consider three cases:¹³

1. If the debt was established prior to the currency exchange contract (via a loan, usurping, or sale), then voluntary clearance of the debt for the liability is permissible based on juristic approbation (*'istihṣān*). However, such clearance is not permissible based on reasoning by analogy (*qiyās*), which was the choice of Zufar. All Ḥanafīs agree that mutual consent is necessary for the permissibility of clearance of the two liabilities.

Reasoning by analogy proceeds as follows in this case: What is required in a currency exchange is receipt of the monies specified in the contract. However, clearance of liabilities is in essence an exchange of one of the rights of the currency exchange contract (the ten silver coins) for another (exoneration for his liability for ten silver coins); and neither such a replacement of one of the compensations, nor the exoneration for one of the liabilities, is permissible, as we have seen.

Juristic approbation, on the other hand, considers the clearance of liability for debt to be a voiding of the original currency exchange contract, and its replacement with a second currency exchange contract in which the price of the gold coin is the debt for ten silver coins. Thus, this ruling is analogous to a case where a contract for a price of one thousand is replaced by another contract with a price of one thousand and five hundred, where the first sale is implicitly voided in order to allow the second sale to be established.

2. The debt may mature after the existence of the currency exchange program (e.g. if the owner of the gold coin receives ten borrowed silver coins from the other party after the contract, or usurps them at that time). In this case, obligatory clearance of the two liabilities is enforced, without need

two would not mutually cancel each other unless both parties agree. In this regard, usurped objects would also have the same legal status as deposited objects. Similarly, clearance of liabilities would not take place without mutual agreement if the two debts were of different genera, different characteristics, or different maturity terms... Then, if the genera of the two debts are different, they may agree to mutually cancel the smaller of the two debts in exchange for canceling the equivalent of its value from the larger debt. Notice that the liability for wife-support may not be mutually cancelled with a debt for the husband on the wife except with mutual consent since the former liability is of lower status. This is to be contrasted with other mutual debts. See 'Ibn 'Abidin ((Hanafi), vol.4, p.250).

¹³See Al-Zayla'ī ((Hanafi Jurisprudence), vol.4, p.140), 'Ibn Al-Humām ((Hanafi), vol.5, pp.206,218), 'Ibn 'Abidin ((Hanafi), vol.4, p.250), Al-Samarqandī ((Hanafi), vol.3, p.37), Al-Kāsānī ((Hanafi), vol.5, p.379 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.14, p.19).

for mutual consent. This ruling follows since both sides are ruled to have indeed received their compensation after the initiation of the contract.

3. The debt may come into effect due to a contract that is initiated after the currency exchange contract took place. For instance, the buyer of the gold coin for ten silver coins may purchase from the other party a dress for ten silver coins. In this case, jurists agree that clearance of the liabilities requires mutual consent. If they voluntarily agree to clearance of the liabilities (ten silver coins for ten silver coins) during the contract session, then there are two reported opinions. The first opinion, which is chosen by Al-Sarakhsī, is that this clearance is not permissible since the Prophet (pbuh) allowed clearance with a past liability not a subsequent one, as narrated by 'Ibn 'Umar.¹⁴

The other, more correct, opinion¹⁵ is based on juristic approbation, and permits this clearance of liabilities as argued previously. In this case, the clearance is in fact a voiding and revocation of the first contract and an establishment of a new contract that incorporates an existing debt. Voiding and invalidating the first currency exchange contract, they have thus established a new contract in which clearance of the liability for an existing debt is valid. This argument is valid since monies are not made non-fungible by identification (*lā tata^cayyanu bi-l-ta^cyīn*), in contracts as well as revocations.

In summary, voluntary clearance of liabilities is established in the first and third cases, while obligatory clearance is established for the second case.

We now consider the permissibility of clearance of the price in a forward sale and the debt the forward seller owes the forward buyer. We also need to consider the three cases here:

1. The debt may be established on the forward seller prior to the forward contract. For instance, the forward buyer may have previously sold the forward seller a dress for ten silver coins, without receiving them. Then, when subsequently they engage in the forward contract, they may agree to mutually cancel the previous debt for ten silver coins for the price in the new forward contract. This voluntary clearance is permissible based on juristic approbation, while Zufar preferred reasoning by analogy that renders it impermissible. As before, all Ḥanafī jurists agree that it is impermissible without mutual consent.

Reasoning by analogy points out that receipt of the price of a forward sale is a legal requirement for its validity. In this regard, clearance negates

¹⁴This *Hadīth* was narrated by 'Aḥmad and 'Aṣḥāb Al-Sunan on the authority of 'Ibn 'Umar as follows: "I came to the Prophet (pbuh) and told him: I sell camels in Al-Baqī', where the price is sometimes named in gold coins and collected in silver coins, or named in silver coins and collected in gold coins. He (pbuh) said: 'there is no harm in exchanging them at the going daily exchange rate, as long as you part with no debts between you,'" c.f. Al-Shawkānī (, vol.5, p.156).

¹⁵'Ibn 'Abidīn ((Ḥanafī), vol.5, p.381).

actual receipt of the price, thus invalidating the forward sale if the parties part without satisfying the receipt condition.

Juristic approbation, on the other hand, points out that even though receipt is required for the forward sale to be valid, the mutual cancellation of the debt for the price is in fact a form of receipt of the price. This reasoning is analogous to the case where the buyer and seller agree on increasing the amounts of the price and object of sale, in which case the contract is appended and the sale effected with the increases.

2. The debt may result from a loan or usurping, and mature after the forward sale contract takes place. In this case, obligatory mutual cancellation of the debt for the price of the forward sale is effected as in the case of currency exchange. In this case, it is ruled that the usurped or borrowed monies have in fact been received, thus taking the place of the legal requirement of receiving the price of the forward sale, provided that the two liabilities are equivalent.
3. The debt may come into effect through a contract that takes place after the forward sale. For instance the initial forward seller may buy some other item from the initial forward buyer. In this case, clearance is not valid, even if it is mutually agreeable to the parties. This is the common opinion of the Hanafis with the unusual exception of one narration of an opinion of 'Abū Yūsuf. The impermissibility is based on the requirement of existence of two liabilities at the time of clearance. However, at the time of the forward sale, only one liability existed, thus requiring an actual receipt of the price, which is not satisfied by a later cancellation of the liability for that price with another debt.

This is the opinion mentioned in 'Ibn Al-Humām ((Hanafi), vol.5, p.206 onwards), where the price in a forward sale is equated to one of the exchanges in a currency exchange contract, when it comes to clearance of liabilities. However, other Hanafi jurists¹⁶ made significant distinctions between the two compensations, thus ruling for the impermissibility of mutual cancellation of a debt for the price of a forward sale in all circumstances. Their ruling is that the object of a forward sale is a liability on the seller. Thus, if mutual cancellation of the price of the forward sale for a debt on the seller were permitted, the trading parties would in fact be exchanging one liability (the original debt) for another (the object of the forward sale), which is forbidden. Note in this regard that the price of the forward sale is not converted through a specification into a non-fungible through such a clearance.

This reasoning is to be contrasted with the case of clearance of a prior debt (or one that is established before but matures after the new contract) in a currency exchange contract. In this case, the price of the previous sale that

¹⁶Al-Suyūtī (a, p.92), Al-Zayla^{cī} ((Hanafi Jurisprudence), vol.4, p.140), Al-Sarakhsī (1st edition (Hanafi), vol.14, p.20), *Baḥth Al-muqāssah* by Professor Madkūr (p.107 onwards).

is exchanged for the current liability is identified and non-fungible, thus not required to be received during the contract session. Thus, mutual cancellation of one part of the currency exchange with the price of the previous sale is viewed as an exchange of a fungible for a non-fungible, which is permitted in currency exchange, but not in forwards.

8.3 Transfers based on loans

There is an incessant need for traders to find conduits through which they can transfer money from one country to another following a currency exchange. Examples include transfers of funds by expatriate workers to banks in their home countries, or directly to their families, transfers parents of expatriate students need to make to their children, as well as local and international money transfers between banks and money exchange firms. In the cases of international transfers, the most common practice is an exchange of money in the domestic currency for money in a different currency to be received in the other country. In what follows, we consider the legality of this practice from the point of view of Islamic jurisprudence.

Note that trading of all paper currency fiat monies inherits its legal status from classical juristic rulings on trading in the two monies: gold and silver. This decision has been approved by many contemporary juristic councils and councils of juristic scholars. Thus, it is forbidden to exchange one currency for another with deferment, i.e. without mutual receipt during the contract session, regardless of whether or not there is any increase. This prohibition is based on the prohibition of *ribā al-nasī'ah*, which forbids deferred sales of monies in equal or different amounts.

Thus, the currency exchange contract must in fact be conducted with a bank or money changing firm without any deferment, and this is in effect how it is conducted in practice. In this respect, the bank or money changer is ready to deliver the compensation during the contract session, but the physical receipt may be replaced by a legal receipt. Of course, this legal receipt could be replaced by a physical receipt and immediate return to conduct the transfer, but that only adds in form rather than the substance of the transaction. Following the money exchange contract, a second and separate transfer of funds from one country to another is concluded on the basis of a loan contract (*'aqd al-qard*). A deferment condition in this transfer transaction (where the time of delivery of the resulting debt is specified) is permitted by 'Imām Mālik, but not by the majority of jurists, as we shall discuss in detail under the section on the loan contract.

As we have seen in the second case of our analysis of clearance of liabilities in a money exchange contract, it is permissible for one party to borrow from the other an amount equal to his compensation, and receive it in fact, thus making clearance of debts obligatory. This loan can be expressed in the form of a receipt that proves the creditor party's right for debt repayment, where the borrower is the bank or money change firm that guarantees repayment of the

debt. However, the bank or money changer also collects a fee for delivering the money in a different country, to compensate for the costs of the transactions: clearing checks, communications, etc.

In my analysis, the sequential use of those two contracts: (1) money exchange (*sarf*), followed by (2) loan (*qard*), is the way in which we can find this common practice of international money transfers to be legal, and Allāh knows best.

On the other hand, there is no disagreement regarding the permissibility of domestic money transfers through the post office, where:

1. The delivery of an amount of money to a postal employee is permitted no doubt, where the postal worker only guarantees the money against loss due theft or negligence. Once all monies thus delivered for transfer are pooled, they are indeed guaranteed by the postal service as a whole.
2. A person may also deliver an amount of money to the postal worker as a loan to the postal service, without a condition of delivering it to a third party. Then, he may later request from the postal worker to deliver it to that third party. This sequence of actions is also permitted.
3. There is also consensus that if the person lent the money, and the borrower was required to deliver it to a particular person at a particular location, with the understanding that the borrower is not ensuring the money except from own-theft or negligence, then the transfer is permitted. However, if it is understood that the borrower also ensures the money against possible losses due to dangers not under its control, then the majority of jurists ruled that the transfer is invalid, while the Ḥanbalīs find it permissible.

8.4 Debt repayment in a different currency

The Ḥanbalīs ruled that it is permissible to repay monies in a different currency according to the exchange rate of that day.¹⁷ In *Al-Muntahā*, it was ruled that it is permissible to repay one monetary liability or deposited amount in one currency or another based on that day's exchange rate. On the other hand, 'Ibn 'Abbās ruled otherwise. The author of *Al-Muntahā* answered those objections by appealing to the *Hadīth* of 'Ibn 'Umar: "I came to the Prophet (pbuh) and told him: I sell camels in Al-Baqī', where the price is sometimes named in gold coins and collected in silver coins, or named in silver coins and collected in gold coins. He (pbuh) said: 'there is no harm in exchanging them at the going daily exchange rate, as long as you part with no debts between you'."¹⁸ He also ruled that: whoever was under liability to pay a gold coin, and repays it in installments with silver coins, then each payment must be deducted from the total according to that day's exchange rate, otherwise it is not valid.

¹⁷ *Al-Mu'tamad fī Fiqh Al-'Imām 'Ahmad*, Damascus: Dār Al-Khayr (vol.1, p.431).

¹⁸This is a weak tradition (*Hadīth da'i*), narrated by 'Abū Dāwūd, Al-Tirmidhī, 'Ahmad, and others.

Chapter 9

Gross-Sales (*bay^c al-jizāf*)

This type of trading is very common in daily market practice. Therefore, it is important to discuss its nature, conditions, and proofs of its legality, concentrating on its most important instances, such as gross-sale trading in foods, monies, and jewelry.

9.1 Nature of the contract

The term *jizāf* is an Arabized Persian term, which refers to sales of goods based on rough estimates of the quantity following inspection, without accurate calculation of volume, weight or number. The term *jizāf* linguistically refers to taking large quantities, thus our translation “gross-sale”. Al-Shawkānī (, vol.5, p.160) defined it as sales of items “whose amount was not known in detail”.

9.2 Proof of its legality

There are two *Hadīths* that prove the legality of gross-sales:

1. Muslim and Al-Nasā'ī narrated on the authority of Jābir that “the Messenger of Allāh (pbuh) forbade the sale of a pile of dates of unknown volume (*ṣubrah*) in exchange for a known volume of dates”.¹ This *Hadīth* implies that it is permissible to trade dates gross-sale if the price is of a different genus. However, if the price is named in dates as well, then the sale becomes a forbidden surplus *ribā*, where one good is sold for an unknown quantity of a good of the same genus. In this regard, ignorance of the amount of one side of the trade is sufficient cause to suspect differences in quantities between the two compensations, and causes to suspect illegality of the exchange warrant its avoidance. In this regard, it is well known that dates are among the six goods listed in the *Hadīth* of goods eligible for *ribā*.

¹ Al-Shawkānī (, vol.5, p.196).

2. The major narrators, with the exception of 'Ibn Mājah and Al-Tirmidhī narrated on the authority of 'Ibn 'Umar that “people used to trade foods gross-sale at the farthest point of the marketplace, and the Messenger of Allāh (pbuh) forbade them from selling it before transporting it [to their shops]”. This *Hadīth* proves the Prophet’s (pbuh) permission for the companions to continue gross-sale trading, but only forbade them from selling it before being in full receipt.

9.3 Status of gross-sales

We now discuss jurists’ discussions of two cases of gross-sale trading: foodstuffs, and jewelry:

The leaders of the four major juristic schools have a consensus that gross-sale of foodstuffs is permissible, with some minor differences that we shall discuss below. 'Ibn Qudāmah (, vol.4, p.123) of the Ḥanbalī school said that: “We know of no disagreement regarding the permissibility of gross-sales of foodstuffs provided that neither the buyer nor the seller knows the amount”. This ruling is based on the above listed traditions of the Prophet (pbuh). However, jurists differed over some of the details as follows:

9.3.1 Ḥanafī opinions

The Ḥanafī jurists² ruled that it is permissible to sell a *cafiz* (container-full) from a pile of foodstuffs, a pile of clothes of unknown number, or a pile of foods of unknown volume, in exchange for a known monetary price. Their ruling was based on the fact that the degree of ignorance in such transactions is minimal and not eligible for legal dispute.

'Abū Ḥanīfa considered a special case where a person sells a pile of foodstuffs (wheat, flour, barley, corn, or other grains) of unknown volume, naming for the transaction the price per unit of volume. He ruled that the sale in this case is valid for one unit of volume only, and suspended for the rest of the transaction. The suspension of the rest of the sale would require removal of ignorance by naming the number of units of volume being sold, or measuring the merchandise during the contract session, which is considered a single unit of time. Thus, he ruled that if the volume being sold is only known after the session expires, the sale is rendered defective and cannot be reverted to validity.

His proof for this decision is that both the price and the object of sale are unknown in this case, to a degree that renders the contract defective. However, since there is no ignorance in one unit of volume, the contract becomes binding for that part that is certain. If the ignorance is removed by determining the number of units of volume being sold, the buyer would then have the option,

²Ibn Al-Humām ((Hanafī), vol.5, p.158), Al-Kāsānī ((Hanafī), vol.5, p.88 onwards), 'Ibn 'Ābidīn ((Hanafī), vol.4, p.29), Al-Zayla^{cī} ((Hanafī Jurisprudence), vol.4, p.5), ^cAbd Al-Ghanī Al-Maydānī ((Hanafī), vol.2, p.7), Al-Samarqandī ((Hanafī), vol.2, p.63), Al-Ṭahāwī ((Hanafī), p.79).

since the contract has been partitioned for him and not for the seller who instigated the partitioning by failing to specify the volume of the merchandise. Thus, if the buyer accepts the sale of the named number of units of volume at the specified price per unit, the sale is concluded. This option is similar to the case of buying merchandise that was not inspected, and then the ignorance was removed through inspection, establishing the option for the buyer.

On the other hand, 'Abū Yūsuf and Muhammad ruled that the sale is valid for the entire pile of foodstuffs, since the object of sale is known through identification by the seller. In this regard, knowing the amount of identified merchandise is not a condition of validity of sales. Moreover, ignorance of the price is not harmful to the contract since counting the number of units of volume in the pile would remove that ignorance during the contract session.

The latter opinion is the one we prefer since it simplifies transactions for people. It was also the choice made by the author of *Al-Hidāyah*, as he cited the proofs of 'Abū Yūsuf and Muhammad after he listed that of 'Abū Ḥanīfa, thus indicating – as was his custom – that the latter proof is more valid. The leaders of other juristic schools also agree with this latter opinion, while the author of 'Ibn Al-Humām ((Hanafi)) preferred the opinion of 'Abū Ḥanīfa and his proof.

The above ruling applies to fungibles, but it does not apply to non-fungibles such as animals, clothes, etc. Thus, 'Abū Ḥanīfa ruled that the sale of a flock of sheep for a named price per sheep is rendered defective. This decision applies for him even if the number of sheep becomes known during the contract session, since significant ignorance existed at the contract time. In this case, it is not valid to sell only one sheep for the named price per sheep due to the major heterogeneity between sheep. This is contrasted to the case of fungibles, where one unit of volume from a pile of wheat is a sufficiently well-defined item due to the homogeneity of wheat (as well as other fungibles). Thus, this type of ignorance is not eligible for legal dispute in the case of fungibles, rendering the contract valid; while it is eligible for legal dispute for non-fungibles, thus rendering the contract defective. 'Abū Ḥanīfa also ruled for the defectiveness of any sale that meets the above description for heterogeneous goods (e.g. camels, etc.), or for goods that are harmed by partitioning the sale (e.g. the sale of fabric by units of length).

In contrast, 'Abū Yūsuf and Muhammad ruled that all such sales are permissible, since the ignorance can be removed once the merchandise is counted.³ In summary, 'Abū Ḥanīfa allowed the sale of only one unit of volume from a pile of foodstuffs, and did not allow the sale of any part of a set of non-fungibles, while 'Abū Yūsuf and Muhammad permitted sales of such sets for both fungibles and non-fungibles. The latter two argued that the ignorance, which 'Abū Ḥanīfa argued would render the contract defective, is easily removed in the end.

³ibid.: Al-Kāsānī ((Hanafi)), p.90), Al-Zayla'ī ((Hanafi Jurisprudence), p.6), 'Abd Al-Ghanī Al-Maydānī ((Hanafi), p.7 onwards).

Containers of unknown measure

The Ḥanafī jurists all agreed on the permissibility of a type of gross-sale that takes the form of measurement by volume or weight, where in fact neither was accurately measured. This sale takes the form of selling a number of measures using a container whose volume is unknown, where they ruled that the sale is permitted, but not binding on the buyer who has the right to measure the contents. They also stipulate an extra condition that the container be solid (e.g. made of wood or iron), rather than elastic (as in straw bags). An exception to the latter restriction is 'Abū Yūsuf's permission of sales of water in a water-skin, due to its customary use in many countries. Also, the Ḥanafī jurists permitted sales by the weight of a rock of unknown weight on condition that the rock is solid. This is in contrast to selling melons by weight, since the weight of such fruits varies with degrees of dryness. They render such sales impermissible.⁴

Known volumes of food

If a buyer buys a pile of foodstuffs advertised to consist of a certain volume, and then it was found to be of smaller volume, he has an option. Since the object of sale is fungible, he can take the pile in exchange for the appropriate portion of the price, but he also may void the entire transaction since the sale is thus partitioned prior to the conclusion of the contract without his consent. In this regard, the fact that the merchandise was less than agreed-upon in the contract clearly constitutes a partitioning of the contract. This ruling applies to all gross-sales of fungibles sold by volume or weight provided that partitioning of the sale does not have harmful consequences.

On the other hand, if the buyer finds that the merchandise exceeded what was agreed-upon in the contract, any increase must be returned to the seller. This follows since both parties agreed on the sale of a particular quantity in exchange for the named price. Thus, the increase over the named quantity was not part of the contract, and thus must be returned to the seller.

For non-fungibles, if the buyer finds that the merchandise was less in amount than what was named in the contract, he has an option either to take the merchandise for the named price, or to return it all. In this case, the partitioning of the sale does not allow the buyer to determine a proportional amount of the price that should be deducted. In this case, the mentioned amount is fundamental for a fungible, implicitly defining a price per unit of measurement, while it is merely a description for the non-fungible, the violation of which may render the entire merchandise useless to the buyer.

On the other hand, if the buyer finds that the purchased non-fungible (dress, land, etc.) was of greater measurement than what was specified in the contract, then the increase is the buyer's to keep, and the seller has no option. In this case, the increase belongs to the whole, and has no share in the price. This

⁴ibid.: Al-Kāsānī ((Hanafī), p.86), Al-Zayla^cī ((Hanafī Jurisprudence), p.5), ^cAbd Al-Ġhanī Al-Maydānī ((Hanafī), p.7), 'Ibn ^cĀbidīn ((Hanafī), vol.4, p.29).

ruling is analogous to the case where a seller sells an item stating that it was defective, but then the buyer finds that it is free of defects.

However, if the non-fungible (e.g. a piece of land) was sold in a contract where the price was explicitly stated on a per-unit basis (e.g. per square foot), and it is found to be smaller than described, then the buyer has the option of taking the sold object for a proportionately reduced price or voiding the sale. In this case, the specification of the price per unit rendered the units a fundamental component of the contract, and the option is established due to the familiar ruling based on the partitioning of the sale.

In this last case, if the sold item is found to exceed the size or amount named in the contract, the buyer has the option either to take the whole amount at a proportionately increased price, or to void the sale. The option is allowed in this case to avoid the loss that may ensue if the buyer is bound to accept the larger object of sale at a higher price.⁵

9.3.2 Mālikī opinions

'Imām Mālik permitted the sale of a pile of food of unknown volume on a per-unit basis. Then the total value of the pile is computed by measuring the number of units of volume in the pile and multiplying it by the named per-unit price. The Mālikīs permit this sale for all types of goods: fungibles, non-fungibles, and countables (e.g. foods, clothes, animals, etc.). This is in contrast to the above mentioned opinion of 'Abū Ḥanīfa, who did not permit such sales for non-fungibles.

9.3.3 Shāfi'ī opinions

The Shāfi'īs permitted the sale of one measure of volume out of a pile of food-stuffs of known total volume, to avoid *gharar*. The more widely accepted opinion also permits such a sale even if the total volume of the pile were unknown to one or both trading parties. This ruling is based on the homogeneity of the parts of the pile, thus rendering the ignorance with regards to the object of sale minor. However, they do not permit the sale of an unidentified piece of a larger land or cloth, due to the significant heterogeneity in such pieces that renders such a sale similar to the sale of one unidentified sheep out of a flock.

They also render as valid the sale of a pile of foodstuffs of unknown volume on a per-unit basis, as well as the sale of a non-fungible such as a house or piece of land on a per-unit bases. In such cases, they ruled that the object of sale is inspected visually, thus eliminating the *gharar* that results from ignorance of the object of sale, while the ignorance of the price is not harmful since it can be calculated.

Moreover, they allowed the gross-sale of a pile of foodstuffs, or a piece of land, etc. without knowledge of its volume or area, and without specifying a per-unit price. In this case, they also ruled that the *gharar* caused by ignorance

⁵ibid.: Al-Kāsānī ((Hanafi), p.92), Al-Zayla'ī ((Hanafi Jurisprudence), p.6), 'Abd Al-Ghanī Al-Maydānī ((Hanafi), p.8).

of the amount or area being sold is eliminated by visual inspection of the object of sale. However, Al-Shāfi‘ī said: “I dislike the gross-sale of a pile of foodstuffs, since its amount is truly unknown”.

If the seller states the amount of the object of sale (e.g. 100 units of volume or area) as well as an overall price (say 100 gold coins) indicated on a per-unit basis (one gold coin per unit of merchandise), then if the amount of the merchandise matched the stated amount, the sale is rendered valid since it meets both pieces of information. However, if the quantity does not agree with the one stated in the contract, then the sale is not valid since the two pieces of information are in disagreement.

On the other hand, it is valid to sell a pile of foodstuffs, stated to be of unknown volume, for a single named price. The sale is considered valid, as we have seen above, since visual inspection negates the type of ignorance that is considered *gharar*, but it is considered reprehensible since the buyer or seller may later regret the transaction.⁶

In summary, the Shāfi‘īs agree with the Mālikīs in permitting gross-sales of fungibles as well as non-fungibles. However, they differ with the Ḥanafīs by invalidating the sale if a full price as well as a per-unit price are both specified but do not agree, whereas the Ḥanafīs permit the sale but give the buyer an option. Finally, the best accepted opinion among the Shāfi‘īs, the one preferred by Al-Nawawī, renders the gross-sale of piles of foodstuffs reprehensible (*makrūh*), due to the *gharar* that it contains.

9.3.4 Hanbalī opinions

The Hanbalīs permitted gross-sales where the buyer and seller do not know the exact amount, whether the object of sale were fungible (e.g. foodstuffs), or non-fungible (e.g. animals or clothes). They also render as valid the sale of fungibles and non-fungibles alike on a per-unit basis, arguing that the object of sale would be thus known by observation. The price in such a case is also considered known since it is easily calculated by measuring the number of units of the merchandise and multiplying it by the specified per-unit price. They also permit the sale of the contents of a container with or without the container. However, if such contents are sold on a per-unit-of-weight basis, the weight of the container must be subtracted from the total weight when determining the price.⁷

In summary, jurists agreed that it is valid for the seller to sell a pile of foodstuffs, fungibles, and non-fungibles measured by weight, volume, or number, on a per-unit basis, even if the total number of units were not known at the contract time. This is the opinion of Mālik, Al-Shāfi‘ī, ’Ahmad, ’Abū Yūsuf, and Muhammad. ’Abū Ḥanīfa, on the other hand, ruled that the sale is only valid for one measure of volume, and invalid for the rest. He argued thus that

⁶Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.16 onwards), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.264 onwards), Al-’Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.9, p.340 onwards).

⁷Ibn Qudāmah (, vol.4, p.123 onwards), Marī ibn Yūsuf (1st printing (Hanbalī), vol.2, pp.12,15).

the total price is unknown, thus rendering the sale invalid in analogy to program sales. He also differed from the other jurists by invalidating all gross-sales of non-fungibles.

9.4 Gross-Sales of money and jewelry

Gross-Sales of money and jewelry are valid provided that the two sides of the trade are of different genera. However, if the two genera are the same, then gross-sale is not permitted since it would thus contain the suspicion of *ribā*, due to uncertainty about volume or weight. It is well known that suspicion of committing a prohibited act is sufficient to warrant its avoidance, which can be accomplished by measuring the volume or weight of the two compensations in the trade, and ensuring equality to avoid *ribā*. This ruling applies not only to money and jewelry, but also to all other goods eligible for *ribā* if sold in exchange for goods of the same genus. Such gross-sales of goods eligible for *ribā* in exchange for goods of the same genus is rendered as invalid as a certain case of *ribā*.⁸

Thus, the Ḥanafīs stipulated the following general principle for the gross-sales of money and similar goods: “A commodity may be gross-sold if and only if it may be traded in unequal quantities”.⁹ This principle is agreed upon in all four major schools of jurisprudence, with distinctions only being made across the schools based on their varying classifications of goods as “eligible for *ribā*” (*'amwāl ribawiyah*) or ineligible. Thus, the Shāfi'īs do not permit the gross-sale of foodstuffs for foodstuffs, or money for money, of the same genus, based on the prohibition of selling an unknown amount of dates in exchange for a known amount of dates.¹⁰

Based on this ruling, we can reach the following conclusions:

1. It is impermissible to gross-sell gold for gold or silver for silver, since they may not be traded in unequal quantities. In this case, gross-sale would result in lack of certainty of equality of the two compensations, thus making it possible for *ribā* to occur. This applies whether one or both parties do not know the weight of each compensation, or if they know one but not the other.

However, if both compensations were weighed during the contract session and found to be of equal weight, then juristic approbation permits the sale. In this case, knowledge of equality was satisfied during the contract session, which is equivalent to knowledge at the inception of the contract. On the other hand, if the buyer and seller part from the contract session before the weighing, and then the two compensations were found to be of equal weight, the sale is still considered defective. Zufar, alone, rendered

⁸ Al-Kāsānī ((Ḥanafī), vol.5, p.68).

⁹ Al-Samarqandī ((Ḥanafī), vol.3, p.39).

¹⁰ Al-Khaṭīb Al-Shirbī ((Shāfi'ī), vol.2, p.25), 'Ibn Qudāmah (, vol.4, p.15), 'Ibn Juzayy ((Mālikī), pp.247,257).

the sale valid in both cases if the weights are equal, arguing that what would prevent the contract from being valid is inequality, which is shown not to be a factor.

2. It is valid to gross-sale one type of money for another of a different genus (e.g. gold for silver), since differences in amounts are permitted in this case. However, it is necessary to have mutual receipt during the contract session in this case, as it is necessary if the monies were of the same genus.

This general principle also gives rise to a number of special cases:

- It is not permissible for two partners to divide arbitrarily goods of a single genus that is eligible for *ribā*, while such arbitrary division is valid if the goods are of different genera. In this case division has the legal status of sales or exchanges, since what one partner takes is a compensation for his share in the joint ownership, thus rendering it a sorting of goods in one sense, and an exchange in another.
- If a sword is exchanged for another in a gross-sale, or a copper-pot is exchanged gross-sale for another of the same genus, without weighing, the sale is valid if those items were sold by number. This follows since the number of items that are sold by number does not enter the definition of *ribā* (which is restricted to volume and weight), thus allowing differences in quantity without effecting *ribā*. However, if those goods were sold by weight, then gross-sale in exchange for goods of the same genus is not permitted as seen above.¹¹
- If adulterated silver or adulterated gold are sold for another metal, then legal consideration is given to the dominant metal. In this regard, silver is commonly dominant for adulterated silver, and gold for adulterated gold. Thus, adulterated silver inherits the legal status of pure silver, and may not be sold in exchange for pure silver except hand-to-hand in equal quantities. This ruling follows since almost all metals are adulterated to some extent, and it is hard to detect the degree to which such metals are adulterated. Also, adulterated silver or gold are viewed as lower-quality versions of those metals, and we have seen that differences in quality are not considered in exchanges of goods eligible for *ribā*.

However, if the adulterated silver was in fact mostly copper, then its legal status would be that of pure copper, and it can only be traded for copper hand-to-hand in equal quantities.

Finally, if the adulterated metal was half silver or gold and half baser metal, it is treated in sales and loan contracts the same as the case where it is mainly silver or gold. Thus it is not permitted to trade it gross-sale or by number. In contrast, it is treated as mainly base metal in the currency exchange contract. In this case, if the half-silver half-copper coins are

¹¹ Ibn Al-Humām ((Hanafi), vol.5, p.185).

traded in exchange for pure silver, the sold object must be subdivided: Thus, the sale is permitted if the pure silver is greater than the amount of pure silver in the adulterated coins. In this case, the increase would be considered compensation for the copper in those coins. However, if the pure silver is less than the silver in the adulterated coins, or if the relative amounts of pure silver are not known, the sale is not permitted based on *ribā*.¹²

- If a sword adorned with gold or silver is sold for a price of gold or silver, then:¹³
 - If the ornament is of the same genus as the price, and if the price is greater than the amount of gold or silver in the sword, then the sale is permitted, where the difference is considered a compensation for the rest of the sword. This follows from the general principle in the Hanafi school to divide the price if part of the object of sale is of the same genus and part of a different genus. In this case, part of the price cancels out the amount of the same genus and the same amount, the rest is considered a price for the rest of the object of sale. We also agree with this opinion.
 - However, if the price is of equal or smaller weight than the ornament, then the sale is not valid, since it contains surplus *ribā*, since the rest of the sword would thus be given with no compensation, which is the very definition of *ribā*.

If the price was not clearly known at the time of the contract, then if the price is discovered during the contract session to be greater than the weight of the ornament, the Hanafis permit the sale. However, if they part from the contract session and later discover that the price was sufficiently large, the majority of Hanafis render the sale impermissible, while Zufar ruled that it reverts to validity, as we have seen in his ruling on gross-sales.

Thus, the general principle is this: “If an object of sale contains an ornament of the same genus as the price, then the price must exceed the amount of that metal in the object of sale. In this case, the excess weight of the price over the ornament is considered a price for the remainder of the object. However, if the price was not greater than the weight of the ornament, or if the latter weight is unknown, the sale is rendered invalid. If the price was of a different genus than the ornament, then the only condition is mutual receipt during the contract session, and inequality of amounts is permitted”.¹⁴

As we have seen, the validity of the sale in the case where the price exceeds the weight of the ornament requires immediate receipt of the portion of

¹² Al-Zayla^{cī} ((Hanafi Jurisprudence), vol.4, p.140 onwards).

¹³ Ibn Al-Humām ((Hanafi), vol.5, p.217 onwards), Al-Samarqandī ((Hanafi), vol.3, p.41 onwards), Ibn ^cĀbidīn ((Hanafi), vol.4, p.247 onwards).

¹⁴ Ibn ^cĀbidīn ((Hanafi), vol.4, p.48).

the price equivalent to that amount of gold or silver during the contract session. However, if the buyer and seller part without mutual receipt, or if one receives his right in the transaction while the other does not, we must consider two cases:

1. If the ornament cannot easily be removed from the object of sale without harm, the entire sale is rendered defective. The part of the sale relating to the ornament is rendered defective due to non-receipt, and the part relating to the rest of the merchandise is rendered defective since it cannot be delivered without causing a loss to the seller (in analogy to selling a ceiling beam of a house). If the gold or silver is indeed physically separated from the merchandise, then that latter part of the sale reverts to validity as in the next case.
 2. If the ornament can indeed be removed without causing harm or loss, the sale is rendered defective for the gold or silver component, and valid for the rest of the object of sale. In this case, the sale is partitioned into a currency exchange for the gold or silver, and a regular sale for the rest of the merchandise. In this regard, mutual receipt during the contract session is only a condition for the validity of the currency exchange portion of the contract.
- Recall, moreover, that there are two necessary conditions for the validity of currency exchange: (1) the contract must not contain a conditional option, and (2) neither compensation may be deferred. If an item containing gold or silver is traded for price paid in gold or silver, then both conditions must be met, otherwise the sale is defective. In this context, three cases are considered.¹⁵
 1. If the gold or silver in the object of sale cannot be separated without causing harm and loss, the entire sale is rendered defective by the conditional option or deferment. In this case, the sale is defective both for the gold or silver and the rest of the merchandise, since neither can be sold alone. However, if the buyer and seller receive the price and merchandise prior to parting, thus voiding the option and dropping the deferment, most of the Ḥanafīs ruled that the contract reverts to validity, while Zufar ruled that it remains defective.
 2. If the gold or silver can be separated from the rest of the merchandise without causing harm or loss, 'Abū Ḥanīfa and 'Abū Yūsuf render the contract defective, since the contract thus contains a defective element and a valid one, where the defect pertains to the object of sale and thus covers the entire transaction. Muḥammad, on the other hand ruled that the sale of the gold or silver is thus invalidated, while the sale of the rest of the merchandise is valid. Thus, in his opinion, the part of the contract that is defective is rendered invalid, and the part that is valid remains valid.

¹⁵Ibn Al-Humām ((Hanafi), vol.5, p.217 onwards).

3. If two traders (i) exchange gold for gold, or silver for silver, of equal weight, (ii) part after mutual receipt, and then (iii) one of them gives the other an additional compensation and the other accepts it, 'Abū Ḥanīfa renders the entire sale defective; 'Abū Yūsuf renders all later additions or deductions nugatory and invalid, while maintaining the validity of the initial sale; and Muḥammad renders deductions permissible as a separate gift, while he renders any addition invalid. The source of this difference in opinion is their differing treatment of the addition of a defective condition after the contract is concluded.¹⁶ 'Abū Ḥanīfa ruled that such a condition is appended to the contract, and renders it defective. Thus, any addition or deduction after the contract is appended to the contract, rendering it defective as though the difference in the two compensations existed at the inception of the contract, thus rendering it defective due to the forbidden *ribā*. Since such a defective condition thus voids the contract, it is not permitted for one party to effect such a voiding, thus requiring that the other party accepts that condition for the defective condition to be appended to the contract.

On the other hand, 'Abū Yūsuf and Muḥammad both ruled that the defective condition is not appended to the contract. 'Abū Yūsuf takes this ruling to its logical conclusion, thus ignoring the defective condition regardless of whether it was an increase or a deduction, thus retaining the validity of the initial contract.

Muḥammad, on the other hand, distinguished between the two conditions of addition and deduction. In the case of addition, if it were valid, it would be appended to the contract and render it defective, and thus such an addition is rendered invalid. Deductions, on the other hand, are valid even if not appended to the contract. For instance, the seller has the right to drop the entire price, and the sale would still be valid without appending the full price deduction to the contract. Indeed, if the full deduction of the price were appended to the contract, it would be a sale without a price, which renders the deduction a gift regardless of the initial sale.

The above analysis all pertained to the case of trading gold for gold or silver for silver. However, if the contract consisted of a sale or currency exchange of gold for silver, and then one party adds or deducts from what he pays the other with the other's consent, the Hanafi jurists unanimously render the addition or deduction valid. In this case, such addition or deduction is appended to the contract, since there is no fear of *ribā* due to the difference in genus between the two compensations.

The only condition in this case is that the addition is received during the session in which it was offered and accepted. However, if the two sides part after that session without receiving the increase, the sale

¹⁶Ibn Al-Humām ((Hanafi), vol.5, p.216), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.246).

is invalidated in proportion to the increase. In this case, the increase is ruled to be appended to the original contract, thus rendering the increase part of the price in a currency exchange, which must be delivered during the appropriate session when it becomes part of the contract.

This is in contrast to deductions, which need not be received during that session when it was proposed and accepted. This follows since the only effect of appending this deduction in price is the inequality of the two compensations, which is not problematic since there is no danger of *ribā* when the exchanged items are not of the same genus. However, the party who collected the amount that was later deducted is obliged to return it to the other party, since appending the deduction to the contract means that this extra amount was not part of the price, and thus must be returned.

9.5 Conditions of gross-sale

The Mālikī jurists stipulated seven conditions for gross-sales,¹⁷ that are briefly discussed here, with added references to the conditions stipulated by jurists of other schools:

1. The object of sale must be visible at the time of the contract or before, and the nature of the object must continue to be known to the parties during the contract. Thus, gross-sales of unseen merchandise, and gross-sale trading of blind persons, are rendered invalid. In this regard, visibility of a connected part of the object of sale that is similar to the rest, and visibility of the top of a pile of foodstuffs, is sufficient to satisfy this condition. Moreover, if the object of sale would be ruined by visual inspection (e.g. vinegar in opaque container, which would be spoiled if the containers are opened), then it need not be visually inspected, but must be described by the seller.

The Hanafīs, Shāfi‘īs, and Ḥanbalīs agree with this condition.¹⁸ Al-Zayla‘ī said in this regard: “One of the conditions for permission of gross-sales is the identification of the object of sale”, and the Shāfi‘īs and Ḥanbalīs said: “visual inspection of a pile of foodstuffs and similar objects of sale is sufficient [for permission of gross-sales], since it removes the potential for *gharar* caused by ignorance.

2. Both the buyer and seller must be ignorant of the exact measure of the object of sale in terms of volume, weight, or number. Thus, if one of the two parties discovers the exact measure and informs the other after the

¹⁷ Al-Dardir ((Mālikī)A, vol.3, p.20 onwards), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.157), Al-Hattāb (1st edition (Mālikī), vol.4, p.285), Al-Dardir ((Mālikī)B, vol.3, pp.35-40), *Al-Gharar wa 'Atharuhu fī Al-'Uqūd* by Dr. Al-Darīr (p.234 onwards).

¹⁸ Al-Zayla‘ī ((Hanafi Jurisprudence), vol.4, p.5), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.265), 'Ibn Qudāmah (, vol.4, p.123).

conclusion of the contract, the second party has an option. The establishment of this option proves that this condition is a condition for making the sale binding, and not a condition for its validity. On the other hand, if both parties knew the exact measure of the merchandise at the time of the sale, the contract is rendered defective, since they ignored the knowledge of its volume and weight and willingly participated in a sale containing *gharar*. In the last case, the merchandise must be returned, unless it has perished in which case the buyer must pay its value.¹⁹

'Ibn Juzayy noted the differences in opinion between the Ḥanafis and Shāfi'īs with regards to this condition, where the latter regard it as a validity condition.²⁰ On the other hand, 'Imām 'Aḥmad ruled that if the seller knows the amount of foodstuffs in his possession, he is not allowed to gross-sell them without measure. He further ruled that if the seller in this situation does indeed gross-sell the foodstuffs without measure, despite his knowledge of the amount, then the sale is valid and binding, but reprehensible since it is better for the seller to inform the buyer of the amount being sold.²¹

3. Gross-Sales are permitted for goods being sold in large quantities, and not by count. Thus, gross-sales of goods measured by volume or weight (e.g. grains and iron, respectively) or by size (e.g. land and cloth) are permitted, while gross-sales of goods measured by count is not permitted unless it is difficult to count them. Thus, if the number of items being sold is sufficiently small to count with ease, it must be sold by number rather than gross-sale. However, if the number is so large as to make counting costly, gross-sales are permitted. Thus, we can see that the point of this condition is to ensure that "gross-sales" are used only when selling goods in such large quantities that the gain from exact measurement is outweighed by the cost and difficulty of such measurement. Thus, gross-sales of countables whose individual items are cheap (e.g. eggs, fruits, etc.) are permitted, while sales of major items where each individual unit has a significant price (e.g. riding animals, some clothes, etc.) must be based on an accurate count. Moreover, the gross-sale of raw gold and silver is permitted, while the sale of gold and silver coins and jewelry requires exact measurement (by weight or number).

In summary, there are four cases based on whether or not counting is difficult, and whether or not the price is low. If counting is easy, then gross-sale without accurate counting is not permitted in either case. If counting is hard, we consider two more cases with regards to whether or not each individual item is sufficiently significant. If the items are not significant, and counting is hard, then gross-sale is permitted. However, if the items are significant, then gross-sales are permitted if each item's

¹⁹Ibn Juzayy ((Mālikī), p.246).

²⁰Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.9, p.343).

²¹Ibn Qudāmah (, vol.4, p.125 onwards).

price is low, and not permitted if each item's price is high.²²

We have already seen the differences among Ḥanafī jurists in this regard. Thus, 'Imām 'Abū Ḥanīfa restricted the permissibility of gross-sales to the first unit (of volume or weight) of fungibles (measured by volume or weight, respectively). On the other hand, we have seen that 'Abū Yūsuf and Muḥammad have permitted gross-sales of all goods measured by volume, weight, measured by size (e.g. cloth, land, etc.), number of homogeneous items (e.g. eggs, nuts, etc.), or number of heterogeneous items (e.g. animals). As I have argued previously, I prefer the ruling based on the latter opinion to make transactions easier for people.²³ We have also seen that this ruling agrees with the permissibility of gross-sales of all items measured by volume, weight, size, or number, in the Shāfi'i and Ḥanbalī schools.

4. The amount of the gross-sale must be estimable by experts at estimation. Thus, gross-sales of goods whose amount cannot be estimated by experts (e.g. pigeons in a dovecot, or chicks running around in a large poultry farm) is not permitted, unless the conditions (e.g. sleep) make it easy to estimate the amount prior to concluding the contract. In this regard, the condition that the amount being sold must be easy to estimate by experts should be sufficient since repeated dealings in the same goods would easily allow the trading parties or their legal agents to acquire the necessary skill to make such accurate estimation. The Shāfi'iṣ have also adopted this condition, requiring the ability to guess the amount of foodstuffs in a sold pile, and – in the better accepted opinion of the school – the sale of bees in the hive if the flow in and out of the hive is sufficient to estimate the total number.²⁴
5. It is also a condition that the amount of the goods being sold by gross-sale is not overwhelmingly large. In this regard, whether the goods are measurable by volume, weight, or number, it is not permitted to gross-sale it if the amount is too large to be reasonably well estimated. On the other extreme, if the amount is not too large, then gross-sale is permitted only if it is measured by volume or weight, while it is not permitted if it is measured by number since counting would be trivially easy in this case.
6. The ground on which the merchandise is placed must be flat (or thought to be flat). Thus, if the land is known not to be flat, the gross-sale would be considered defective due to the excess uncertainty (*gharar kathīr*) caused by difficulty of estimating the amount being sold. If the land was believed by both parties to be flat, but then it is found to be otherwise, the buyer has an option if the non-flatness favored the seller (by making the

²² *Hashiyat Al-Dusūqī* (vol.3, p.21).

²³ Al-Kāsānī ((Hanafī), vol.5, pp.88-90), ^cAbd Al-Ghanī Al-Maydānī ((Hanafī), vol.2, p.7 onwards).

²⁴ Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'i), vol.9, pp. 345,353), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.265).

goods seem more than they were). On the other hand, the option is given to the seller if the non-flatness favored the buyer (by making the goods seem less than they were). The Shāfi‘īs have agreed with the Mālikīs on this condition for sales of piles of foodstuffs. They also added similar conditions for sales where other circumstances may make the merchandise seem more or less than its real amount.²⁵ The Ḥanbalīs also agreed with this condition, and the resulting option to the buyer or seller depending on whom is favored by the non-flatness of the ground.²⁶

We can also infer that the Hanafis implicitly required a similar condition in their analysis. In this regard, we recall their ruling that permitted gross-sales of goods in a container, provided that the container was not flexible.²⁷

7. The merchandise of a gross-sale should not consist of a portion being sold by gross-sale, and another that is measured, whether the two parts are of the same or different genera (e.g. mixing measured grains with unmeasured grains or land, measured land with unmeasured grain or land, measured with unmeasured land). In all such cases, the legal status of the sale of the known amount is affected by the ignorance inherent in the other part.

However, it is permissible to combine two sets of merchandise in one contract, where each is sold in the manner appropriate to it. Thus, it is permissible to have a contract where a known volume of wheat and an unmeasured piece of land are sold, the first according to its volume and the second by gross-sale, for one named price. In such a case, since the part measured by volume is explicitly sold as such, and the part of unknown quantity was explicitly sold as such, there is no legal restriction to prevent the contract.²⁸

²⁵ Al-Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.9, pp.315,345,350), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), ibid.).

²⁶ Ibn Qudāmah (, vol.4, p.124 onwards).

²⁷ Al-Zayla‘ī ((Hanafi Jurisprudence), vol.4, p.5), Al-Kāsānī ((Hanafi), vol.5, p.86).

²⁸ Al-Dardīr ((Mālikī)A, vol.3, p.23).

Chapter 10

Ribā

This chapter will deal exclusively with the “*ribā*” that is a categorically forbidden type of sale. The chapter will proceed in four sections:

1. Defining *ribā*, and proofs of its prohibition.
2. Types of *ribā*.
3. Criteria of eligibility for *ribā* according to the different juristic schools.
4. The consequences of juristic differences over the causes of *ribā*.

10.1 Definition and Proof of Prohibition

The lexical meaning of “*ribā*” is “increase”. Allāh (swt) said: “But when we pour down rain on it, it is stirred to life, and it swells (*rabat*)” [22:5]. Thus, the growth that comes forth from the ground is labeled as *ribā*. He (swt) also said: “Lest one party would be more numerous (’arbā) than the other” [16:92]. Thus, an increase in number, amount, etc., is considered “*ribā*” in the lexical sense of the word.¹

The legal sense of the term *ribā* for the Ḥanbalīs is restricted to increases in specific items. The Ḥanafīs defined it in *Kanz Al-Daqā’iq* as: “An increase in one good for another in an exchange, without a compensation (“*iwad*”) for the increase”. This definition includes the increase in one of the goods even if that increase is legally inferred rather than directly observed. Thus, the definition covers both *ribā al-nasi’ah*, as well as [many] defective sales, since deferment of one of the two compensations in an exchange results in a legal inference of increase (since time naturally requires a compensation) even if the increase is not tangible.²

¹Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol.2, p.21), Al-Ramlī ((Shāfi’ī), vol.3, p.39).

²Ibn ‘Abidīn ((Hanafi), vol.4, p.184).

Ribā is forbidden in the Qur'ān, the tradition of the Prophet (pbuh) (*Sunnah*), and consensus (*'ijmā'*). In the Qur'ān, the strongest prohibition is provided in the verses [2:275–279]:

Those who devour usury (*ribā*) will not stand except as stands one whom the Evil One by his touch hath driven to madness. That is because they say: 'trade is like *ribā*', but Allāh hath permitted trade and forbidden *ribā*.³

Those who after receiving direction from their Lord desist shall be pardoned for the past; their case is for God (to judge); but those who repeat (the offense) are companions of the fire. They will abide therein (forever).

God will deprive usury of all blessing, and He will give increase for deeds of charity. For He loves not creatures ungrateful and wicked.

O ye who believe! Fear God, and give up what remains of your demand for *ribā* if ye are indeed believers.

If ye do not [give up *ribā*], take notice of a war from God and His Apostle; but if ye turn back ye shall have your capital sums, without increase or diminution.

The prohibition of *ribā* began during the eighth or ninth year after the Prophet's (pbuh) emigration (*hijrah*) to Madīnah.

There are many proofs of the prohibition of *ribā* in the Sunnah of the Prophet (pbuh). Among them is the *Hadīth*: "Avoid the seven grave sins...", among which he mentioned devouring *ribā*.⁴ Also, 'Ibn Mas'ūd (mAbpwh) narrated that "the Messenger of Allāh (pbuh) cursed the one who devours *ribā*, the one who pays it, the one who witnesses it, and the one who documents it".⁵ Also, Al-Hākim narrated on the authority of 'Ibn Mas'ūd that the Prophet (pbuh) said: "There are seventy three different types of *ribā*, the least of which is equivalent

³In the verse [2:275], Allāh debunks the statement of the Arabs before Islam that a sale with no *ribā* is identical to one with *ribā* [properly adjusted]. In other words, they argued that adding the increase to the original price at the time of inception of the sale is identical to adding the increase at the end, when debts and liabilities are due. Allāh made it clear that the difference is significant between the first increase, which is due to deferment of the debt, and the second, which is part of the sale. In this regard, the increase in a sale is part of the compensation for the object of sale, whereas *ribā* is purely a compensation for time in deferment, c.f. the exegesis of Al-Qurtubī and *Majma'* *Al-Bayān* by Al-Tibrusī.

⁴Narrated by Muslim on the authority of 'Abū Hurayrah, that the Prophet (pbuh) said: "Avoid the seven grave sins". The companions asked: "And what are they, O Messenger of Allāh?". He said: "They are: associating others with Allāh, engaging in magic, killing a forbidden human soul without a legal right, devouring *ribā*, devouring the wealth of an orphan, escaping on a day of religious battle, and defamation of unsuspecting believing married women", c.f. 'Ibn Daqīq Al-'Id (, p.518).

⁵Narrated by 'Abū Dāwūd and others in that form, and narrated by Muslim on the authority of Jābir that "the Messenger of Allāh cursed equally the one who devours *ribā*, the one who witnesses it, and the one who documents it", which is also similar to the narration of Al-Bukhārī on the authority of 'Abū Juhayfah. Al-Tirmidhī and 'Ibn Mājah narrated on the authority of 'Anas a *Hadīth* that contained the same curse, c.f. Al-Haythamī (, vol.4, p.118), Al-San'ānī (2nd printing, vol.3, p.36), Al-Shawkānī (, vol.5, p.154).

to bedding one's mother, and the worst of which is equivalent to destroying the honor of a Muslim".⁶ There are many other *Hadīths* in this area, some of which will be listed in the subsection dealing with its causes.

The Islamic nation is in consensus over the prohibition of *ribā*. In this regard, Al-Māwirdī said: "To the point that no legal system (*sharī'ah*) has ever permitted it", as evidenced by the verse "That they took *ribā*, though they were forbidden to do so" [4:161], meaning in the previous revelations.⁷

There are two main types of *ribā*:

1. *Ribā al-nasī'ah*, which is the only type known to pre-Islamic Arabia. This is the *ribā* collected in compensation for deferring a due debt to a new term of deferment. This definition applies regardless of the source of the due debt: whether it resulted from a loan, or a deferred price in a sale.
2. *Ribā al-buyū'c* (sales) for six goods (gold, silver, wheat, barley, salt, and dates). This is also known as *ribā al-fadl*, which was forbidden to prevent potential circumvention of the prohibition of *ribā al-nasī'ah*, which can be effected by selling gold with a deferred price, which he later pays with increase containing *ribā* disguised through a payment in silver. [tr: note that "gold and silver" are often used to denote the two types of money used during the prophet's (pbuh) time (Roman Dinārs and Persian Dirhams, respectively).]

The first type of *ribā* is the one forbidden in the Qur'ān, and it is the *ribā al-jāhilīyyah*. The prohibition of the second type of *ribā* was established in the *Sunnah* by analogy to the first kind, based on an increase without proper compensation. The *Sunnah* also added a prohibition of a third type of sale, called *bay' al-nasā'* or deferment sales, where the two compensations are different and one of them is deferred. In this case, deferring one of the two compensations implies an increase, in similarity to a loan that results in some benefit, since the deferment may be viewed as an exchange of an item for itself.⁸

The legal status of a *ribā* contract is thus: forbidden and invalid for the majority of jurists, defective for the Ḥanafīs.

10.2 Types of *Ribā*

The majority of jurists classify *ribā* in sales into two categories: *ribā al-fadl* and *ribā al-nasī'ah*.⁹ The Ḥanafī jurists defined *ribā al-fadl*, which is a sale,

⁶Narrated in an abridged form by 'Ibn Mājah, and in full by Al-Ḥākim, who rendered it valid. There are many similar *Hadīths*, which include the mention of seventy types of *ribā*, and of seventy two types, c.f. Al-Haythamī (, vol.4, p.117), Al-Ṣan'ānī (2nd printing, vol.3, p.37).

⁷Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.21), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.270), 'Ibn Qudāmah (, vol.4, p.1), Al-Sarakhsī (1st edition (Hanafī), vol.12, p.109), Al-Kāṣānī ((Hanafī), vol.5, p.274), *Hāshiyat Qalyūbī and Umayrah* (vol.2, p.166).

⁸'Abū-'Ishāq Al-Shāṭibī (1970, vol.4, p.40).

⁹Ibn Al-Humām ((Hanafī), vol.5, p.183), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.129), *Hāshiyat Al-Dusūqī* (vol.3, p.47), 'Ibn Qudāmah (, vol.4, p.1), 'Ibn Qayyim Al-Jawziyyah

as follows: “It is an increase in the measure (weight or volume) of one of two compensations of the same genus in a sales contract”.¹⁰ Note that we do not restrict the definition to the case where such an increase is stipulated as a condition in the contract (as Al-Kasānī had done). In this regard, *ribā* results from increase in a sale or loan, whether or not that increase is stipulated as a condition.

We further note that the definition clearly identifies increases in terms of legal measurements by weight (for items conventionally measured by weight) and volume (for items thus measured). This intentionally excludes differences in value, which are deemed to have no legal consequences. It also excludes difference in size or number for non-fungibles, since they are not eligible for *ribā*. Thus, “*riba*” (in the sense of increase) is not forbidden in trading non-fungibles such as animals, furniture, real estate, etc. Such items may be traded in different quantities. In this regard, *ribā* (in the legal sense) is restricted only to items measured by weight and volume. On the other hand, if one meter of cloth is traded for six, one egg is traded for two eggs, or one sheep is traded for two sheep, the trade is permitted provided that the exchange takes place during the contract session. However, if either compensation in such trades is deferred, the sale is not permitted, since unity of the genus by itself is sufficient to forbid *ribā al-nasā'*, which results from deferment.

Thus, the definition of *ribā al-fadl* may be restated thus: “It is the trading of one set of goods that are eligible for *ribā* for another set of the same goods, with an increase of one compensation over the other”. Thus, in summary, exchanging such *ribawi* goods requires equality of the amounts exchanged if they are of the same genus. ’Abū Yūsuf defines equality by applying the conventional measurement device (weight or volume) for each compensation separately, and then determining if they are equal according to that measurement.

Note, moreover, that the prohibition of *ribā* when trading in gold and silver (as the two monies used during the Prophet’s (pbuh) time), and whatever other forms of money are commonly used, does not distinguish between raw metals and those minted into legal tender coins. Thus, jurists stated that raw silver and silver coins are treated as equivalent. However, ’Ibn Al-Qayyim permitted selling gold and silver jewelry (provided they are intended for legitimate usage, e.g. as female jewelry or a permitted silver ring) for more than their weight in gold or silver. Such increase is permitted as a compensation for the workmanship used to produce the jewelry, as well as the consumers’ need for such trading.¹¹

The Ḥanafis define the type of sale called *ribā al-nasi’ah* as follows: “Compensation for the preference of immediate payment over deferment, and [compensation for the] preference of an identified object over one defined by its characteristics as a liability, where the objects are measured by weight or vol-

((Hanbalī), vol.2, p.135).

¹⁰’Ibn Al-Qayyim called it: “The hidden *Ribā'*”, which was forbidden to guard against circumvention of the law, as evidenced by the *Hadīth* of ’Abū Sa’īd Al-Khudriy (mAbpwh) that the Prophet (pbuh) said: “Do not trade one Dirham for two Dirhams, for I fear that you may fall in *ribā'*.

¹¹’Ibn Qayyim Al-Jawziyyah ((Hanbalī), vol.2, p.140).

ume,¹² and are of different genera, or measured otherwise but are of the same genus". Thus, trading goods of some genus for goods of the same or another genus with an increase in the measure (by volume or weight) in compensation for deferment fall under this definition. Examples include trading one volume of wheat for one and a half volumes to be paid in two months, trading one volume of wheat for two volumes of barley to be paid in three months, or (without increase) trading one volume of dates delivered immediately for one volume of dates to be delivered later. Examples for items not measured by volume or weight include trading one large fruit in exchange for two large fruits to be delivered in a month.¹³

In all such examples, *ribā al-nasī'ah* is established due to increase in one of the two traded sets of goods without a compensation. The prohibition in the case of equality of the amount, on the other hand, is caused by the differences in value. In this regard, neither party would normally accept deferring his right in the exchange without receiving an increase in value, which – of course – is *ribā*.¹⁴

'Ibn 'Abbās, 'Usāma ibn Zayd, Al-Zubayr, and 'Ibn Jubayr, among others, argued that the only forbidden *ribā* is that involving deferment (*ribā al-nasī'ah*). They based it on the *Hadīth* narrated by Al-Bukhārī and Muslim on the authority of 'Usāma that the Prophet (pbuh) said: "There is no *ribā* except with deferment". This opinion is debunked based on the many *Hadīths* banning *ribā al-fadl*. This is indeed the evidence based on which 'Ibn 'Abbās reversed his opinion, as narrated by Jābir ibn Zayd. Later, all the followers of the Prophet (pbuh) reached a consensus of the prohibition of both types of *ribā*, and no disagreement remains. The *Hadīth* that had led to this difference in opinion is interpreted as follows: The Prophet (pbuh) was asked about exchanging wheat for barley and gold for silver with deferment, and he (pbuh) said: "There is no *ribā* except with deferment", in reference only to the question posed before him

¹²Ibn Al-Qayyim labeled this increase "blatant *ribā*" (*al-ribā al-jaliyy*). It was common before Islam, where the creditor would tell the debtor when the debt matures: "pay or increase your debt". It results in compounded profits.

¹³The deferred payment is in compensation for an immediate delivery of goods. The preference of immediate payment over deferment is self evident. The preference of an identified object over its description as a liability, since the latter when delivered may not possess all the desired characteristics, and may even fail to be delivered at all. In this regard, the object of sale may be unidentified and defined as a liability (e.g. unidentified amounts of wheat) in exchange for an identified amount of barley, which is an identified price. In this regard, since an identified object is preferred to a fungible liability, even if it is to be paid instantly, the requirement of equality of the two compensations is necessary to avoid suspicion of having an increase that constitutes *ribā*. The preference of an identified object over a fungible liability is made clear by the fact that it is not permitted to take *zakāh* on identified non-fungibles in the form of fungibles. Moreover, the requirement of exchanging non-fungibles for non-fungibles is established in the *Hadīth* through the expression "hand-to-hand", since the hand in this case identifies the objects being traded. Similarly, the condition of equality is established through his (pbuh) saying "in equal amounts" (*mithlān bi-mithl*). Thus, when exchanging two sets of goods eligible for *ribā* requires identifying them to ensure equality. This requirement is a small generalization of the more basic requirement for permissibility in all sales that one of the two exchanged goods is identified, to avoid trading one debt for another, which is *ribā*.

¹⁴Abū-'Ishāq Al-Shātibī (1970, vol.4, p.42).

[where deferment was postulated]. Thus, it would seem that the narrator either did not hear the first part of the encounter, or did not make an effort to include it in the narration.¹⁵ In this regard, it would seem that the Prophet's (pbuh) statement “There is no *ribā*...” really means to emphasize that the more serious, more common, and more punishable *ribā* is the one caused by deferment. This is a common expression of Arabs, who would say “there is no scholar in the land except for so-and-so”, to emphasize that he is the most knowledgeable, not that there physically are no other scholars.

The Shāfi‘īs define three types of *ribā*:

1. *Ribā al-fadl*, which is effected by an increase of one traded set of goods over its compensation without any deferment. This type of *ribā* comes into effect only if the two compensations are of the same genus (e.g. wheat for wheat, gold for gold, etc., in different quantities). The scholars are unanimous over the prohibition of this type of *ribā* and its characterization, based on the *Hadīth* narrated by Al-Bukhārī and Muslim on the authority of ’Abū Sa‘īd Al-Khudriy: “Do not trade gold for gold except in equal amounts, with no increase of one over the other; and do not trade silver for silver except in equal amounts, with no increase of one over the other”.
2. *ribā al-yad*, which is effected in a trade with deferment of receiving one of the compensations, or without mentioning the term of deferment. In other words, this *ribā* comes into effect if two goods of different genera (e.g. wheat and barley) are traded without mutual receipt during the contract session. The Hanafis include this type of *ribā* under their definition of *ribā al-nasi‘ah*, where they cite preference of identified (and thus non-fungible) goods over liabilities (which must be fungible). The ruling for this type of *ribā* follows as a special case of the condition of mutual receipt if both traded goods are eligible for *ribā*. In this case, the condition is violated since receipt of one or both of the compensations is delayed by action (and not via a stipulated condition). Proof of the prohibition of this type of *ribā* is offered in the *Hadīth* narrated by Al-Bukhārī and Muslim: “Gold for gold is *ribā* unless it is hand-to-hand”.
3. *Ribā al-nasi‘ah*, where one of the two compensations is increased because of deferment, with no other form of compensation for that increase. This type of *ribā* comes into effect regardless of whether the traded goods are of the same or of different genera, and whether they are traded in equal or different amounts. Proof of the prohibition of this *ribā* is provided in the *Hadīth* narrated by Muslim on the authority of ’Ubādah: “And if the genera are different, then sell as you wish as long as it is hand-to-hand”, as well as the *Hadīth* narrated by Al-Bukhārī and Muslim on the authority of ’Abū Sa‘īd Al-Khudriy: “And do not trade when one of them is delivered immediately and the other is deferred”, and the above mentioned *Hadīth* narrated by Muslim: “In equal amounts, hand-to-hand”.

¹⁵Al-Sarakhsī (1st edition (Hanafī), vol.12, p.112), Al-’Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.10, p.48; continuation of Al-Subkī).

The Shāfi‘īs recognize the last two categories only if the traded goods are of different genera. The difference between the two types in their school is that *ribā al-yadd* results from delay of physical receipt, while *ribā al-nasi‘ah* results from delay (however short) of the right to receipt through the contract. Thus, *ribā al-nasi‘ah* is restricted in their school to sales that mention deferment, while *ribā yadd* deals with the case of an immediate trade where the actual receipt is delayed. One of the Shāfi‘īs (Al-Mutwallī) added a fourth type of *ribā*, which he defined as “the *ribā* of a loan with a stipulated condition beneficial to the creditor”. However, Al-Zarkashī ruled that this last type can be subsumed under *ribā al-fadl*.¹⁶

In summary, *ribā al-nasi‘ah* is the deferment of a liability in return for an increase (which is also called *ribā al-jāhiliyyah*), or the delay of receiving one of two compensations when trading goods eligible for *ribā* for goods of the same genus. In contrast, *ribā al-fadl* is increasing the amount of one compensation when trading goods eligible for *ribā* with goods of the same genus immediately with no deferment.¹⁷ Note thus, that if a trader says that the cash-price of a good is five dollars, and the deferred price is six, then the deferred sale is indeed permitted with no *ribā*, since the two compensations are of different genera. However, some of the Zaydī jurists render it a forbidden form of *ribā*.

10.2.1 Suspicions of *ribā*

Ibn Kathīr said that *mukhābarah* (financing agricultural production with agricultural goods), *muzābanah* (exchanging fresh dates on palms for dried dates), *muhāqalah* (exchanging grains in their spikes for separated grains), and similar practices, were all banned to avoid the suspicion of (and possibility of effecting) *ribā*. His reasoning is that equality in such transactions cannot be ascertained before the goods dry-out. Thus, jurists ruled that ignorance of equality has the legal status of knowledge of inequality. Based on this ruling, they forbade many of the methods that may be used to circumvent the prohibition of *ribā*.¹⁸

10.3 Causes of *ribā*

Jurists agreed on the prohibition of surplus *ribā* in the seven goods listed in the *Hadīth*: gold, silver, wheat, barley, dates, raisins, and salt. Thus, trading any of those goods for goods of the same genus in different quantities is forbidden. However, jurists disagreed over the prohibition of trading in the same genus in different amounts for other goods:

- The Zāhirīs restricted the prohibition to the listed goods.

¹⁶ Al-Ramlī ((Shāfi‘ī), vol.3, p.39), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.21), *Hāshiyat Qalyūbī wa Ḩumayrah* (vol.2, p.167), *Hāshiyat Al-Sharqāwī* (vol.2, p.30 onwards).

¹⁷ *Uṣūl Al-Buyūc Al-Mamnū‘ah* (p.95).

¹⁸ See *Tafsīr Ibn Kathīr* (vol.1, p.327).

- Al-Shāfi‘ī, and one of the narrations on ‘Imām ’Ahmad, restrict the prohibition to the two monies (gold and silver), and foodstuffs, whether or not they are measured by weight or volume. They define foodstuffs in this regard as anything consumed or stored as nutrition, dessert, or medicine.
- The opinion of Sa‘īd ibn Al-Musayyib, and one narration each for Al-Shāfi‘ī and ’Ahmad, restrict the prohibition to the two monies, and foodstuffs measured by volume or weight.
- Mālik restricted the prohibition to nutritious foodstuffs that can be stored as a source of nutrition. ’Ibn Al-Qayyim considered this the most correct opinion.¹⁹

In what follows, I shall discuss the most important of those opinions in some detail:

10.3.1 Hanafi rulings

The Hanafis argued that the cause for *ribā al-fadl* (by which goods eligible for *ribā* are defined) is the trading of any good measured by weight or volume in exchange for goods of the same genus. In such cases, both trading instantaneously in different amounts, or trading with deferment, are forbidden.²⁰ Thus, the cause for prohibition for the four goods mentioned in the *Hadīth* (wheat, barley, dates, and salt, when traded for goods of the same genus) is that they are measured by weight. For gold and silver, the cause of prohibition of trading in exchange for the same genus is that they are measured by weight. Thus, the cause for *ribā al-fadl* requires the two factors: amount (in weight or volume) and genus.²¹ Thus, they ruled that fungibles (measured by weight and volume) are eligible for *ribā* (if traded in different quantities or with deferment), while non-fungibles (e.g. animals, real estates, jewelry, etc.) are not eligible for *ribā*. Thus, it is permissible to trade one sheep for two sheep, since sheep are not measured on any uniform scale. Also, *ribā al-fadl* does not apply to fungibles measured by size or number.²²

This ruling is based on a valid (*Hadīth*) narrated on the authorities of ’Abū Sa‘īd Al-Khudriy and ’Ubadah ibn Al-Šāmit (mAbpwt) that the Prophet

¹⁹’Ibn Qayyim Al-Jawziyyah ((Hanbalī), vol.2, p.136).

²⁰’Ibn Al-Humām ((Hanafi), vol.5, p.183), Al-Kāsānī ((Hanafi), vol.5, p.274), Al-Tahāwī ((Hanafi), p.75), Al-Sarakhsī (1st edition (Hanafi), vol.12, p.110), ’Ibn ’Abidīn ((Hanafi), vol.4, p.186).

²¹In this regard, an object is determined to be measured by weight or volume based on convention during early Islamic history. ’Abū Dāwūd and Al-Nasā’ī narrated in this regard on the authority of ’Ibn ’Umar (mAbpwt) that the Messenger of Allāh (pbuh) said: “Measurement by weight is determined according to practice of the people of Makkah, and measurement by volume is determined according to the practice of the people of Madīnah”, c.f. ’Ibn Al-’Athīr Al-Jazārī (, vol.1, p.371), ’Ibn Hajar (, p.183). ’Abū Yūsuf ruled that the method of measurement for goods eligible for *ribā* is determined by convention in each society, and may change across time and place, c.f. *Al-Madkhal Al-Fiqhi* by Prof. Al-Zarqā’ (p.514).

²²’Ibn ’Abidīn ’ilā Nażariyyat Al-’Iltizām by Prof. Al-Zarqā’ (p.139), ’Ibn ’Abidīn ((Hanafi), vol.3, p.185).

(pbuh) said: “Gold for gold, in equal amounts, hand-to-hand, and any increase is *ribā*; silver for silver, in equal amounts, hand-to-hand, and any increase is *ribā*; wheat for wheat, in equal amounts, hand-to-hand, and any increase is *ribā*; barley for barley, in equal amounts, hand-to-hand, and any increase is *ribā*; dates for dates, in equal amounts, hand-to-hand, and any increase is *ribā*; and salt for salt, in equal amounts, hand-to-hand, and any increase is *ribā*.”

1. Reasons for the prohibition of surplus *ribā*

Ribā al-fadl was prohibited to avoid injustice and financial losses. The foundation for the prohibition is to prevent the means of circumventing the prohibition of *ribā al-nasī'ah*. For instance, trading goods of the same genus in different quantities (e.g. one silver coin for two silver coins) would only take place if the goods are different (e.g. purity of the metal, quality of minting, weight, etc.). The implicit profit in such a simultaneous trade may then easily lead to an implicit profit where one of the two goods is deferred, which is precisely the forbidden *ribā al-nasī'ah*.

The prohibition of *Ribā al-fadl* in the case of trading goods of different genera (e.g. wheat for barley) with deferment of one of them is also to prevent circumvention of the law. If difference in quantities were permitted in such a trade of goods of different genera with deferment, then a person would be able to borrow gold and repay later in silver with an implicit *ribā* of the desired amount. Thus, Islamic Law has specified simple rules of demarcation for permitted and forbidden transactions, to avoid complicated analyses that may lead to debates over whether small variations within one type of goods would be sufficient to avoid the “same genus” rulings.

Of course, there are instances where the prohibition may be explained on the basis of grounds other than prevention of circumventing the Law. For instance, in trading a large quantity of lower quality goods in exchange for a small quantity of higher quality goods, the difference in amount may be an approximate compensation for the difference in quality. However, it is forbidden since it contains major uncertainty (*gharar*) in such transactions, which prevents the parties from knowing whether the compensation is excessive or insufficient.²³

Note also that *ribā* is not restricted to exploitative transactions (i.e. where a rich creditor collects *ribā* from poor and needy creditors). Indeed, *ribā al-jāhiliyyah* may be a form of financing investments, where the debtor is an entrepreneur who repays the investor/creditor his principal plus a pre-determined interest rate. Moreover, the Messenger of Allāh (pbuh) has equated in prohibition and guilt both the needy and the one who exploits him, when he said (pbuh): “Thus whoever increases or asks for increase would have effected *ribā*; the taker and the giver are equal [in guilt]”, and he (pbuh) cursed equally both the one who pays *ribā* and the one who devours it.²⁴

²³ Abū-'Ishāq Al-Shātibī (1970, vol.4, p.42), *Al-Qiyās* by 'Ibn Al-Qayyim (p.114), 'Ibn Qayyim Al-Jawziyyah ((Hanbalī), ibid.), *Al-Jazīrī* (1986, vol.2, p.247 onwards), *Al-Madkhal Al-Fiqhī* (ibid.).

²⁴ *Hukm Wadā'i c Al-Bunūk* by Dr. c Alī Al-Sālūs, (p.64).

2. Minimum amount to effect surplus *ribā*

The minimum amount of foodstuffs for which *ribā* may be effected is 1.35 kilograms, since any amount less than that is not subject to juristic analysis.²⁵ Thus, it is permissible to trade smaller amounts with increase (e.g. two handfuls of wheat for four handfuls, or one apple for two apples, with mutual receipt during the contract session). This follows since the quantities are too small for a measure of equality to be applied, thus ignoring the increase for all legal purposes. For goods eligible for *ribā* that are measured by weight, the minimum amount for which *ribā* may be effected is roughly 59 grams of gold or silver. For trades of amounts smaller than the minimum for which *ribā* is effected, the two compensations must be identified (thus made non-fungible). Thus, jurists agree that trades in different quantities (no matter how small), where one or both sides of the transaction are not specified, are not permitted.²⁶

3. Types of causes

Thus, the cause for *ribā* defined as “trading different quantities of the same genus” applies to foodstuffs and other goods. Thus, we may infer by analogy from wheat and barley (which are mentioned in the *Hadīth*) the applicability of this cause for all goods measured by volume (e.g. corn, rice, etc.). Similarly, one may reason by analogy to extend the prohibition for gold and silver to all other items measured by weight (e.g. lead, copper, etc.). However, *ribā al-faḍl* does not apply for items not measured by weight or volume (e.g. clothing measured by size, and eggs measured by number). Thus, trading one egg for two, or one piece of cloth for two, is permitted provided that mutual receipt takes place during the contract session.

4. Measuring goods eligible for *ribā*

Note that what is listed in legislative texts as measurable by volume (wheat, barley, dates, and salt) and what is listed there as measurable by weight (gold and silver), continue to be thus measured forever, even if people no longer conventionally measure and deal in this fashion. This is the opinion of the Shāfi‘īs, Ḥanbalīs, and the majority of the Ḥanafīs, based on the *Hadīth*: “The volume measure is that of the people of Madīnah, and the weight measure is that of the people of Makkah”.²⁷ Thus, trading wheat for wheat with equal weight is not permissible, and trading gold for gold or silver for silver in equal volume is also not permitted. In this regard, the text takes precedence over conventional usage, and the means of measurement of those goods are defined in the above listed text.

²⁵ Al-Kāṣānī ((Hanafi), vol.5, p.278), 'Ibn 'Abidin ((Hanafi), vol.4, p.188).

²⁶ 'Ibn 'Abidin ((Hanafi), vol.4, pp.189,191).

²⁷ Narrated by 'Abū Dāwūd and Al-Nasā'ī on the authority of 'Abdullah ibn Umar. Also narrated by Al-Bazzār, and its validity is authenticated by 'Ibn Ḥibbān and Al-Dāraqutnī, c.f. Al-Shawkānī (, vol.5, p.198).

I have noted previously that 'Abū Yūsuf ruled that the means of measurement for all goods, whether or not they are mentioned in the legislative texts, is determined by convention. I find that his opinion is better supported, since the text asserts only the need for equality in volume or weight when trading goods eligible for *ribā* with goods of the same genus. The demarcation between the goods measured by volume and those measured by weights was determined according to the convention in markets during the life of the Prophet (pbuh). Thus, inferring by analogy from that text would require referring to the relevant convention in the relevant markets. The Mālikīs have also supported this view, ruling that : “If people’s market conventions differ in determining the means of measuring certain goods, their measurement is determined by the convention used in that market”. As for goods that were not mentioned in the legislative texts, it is clear that measurement should follow the convention of the relevant market.²⁸

5. Irrelevance of the goods’ quality

As noted above, the quality of goods eligible for *ribā* is not a factor when determining whether or not *ribā* is effected. The general juristic principle is that in goods eligible for *ribā*, “high and low quality are treated as identical”.²⁹ Thus, trading goods for goods of the same genus in different amounts is forbidden *ribā al-fadl* regardless of the qualities of the two sets of goods. This ruling is supported by the *Hadīth* narrated by Al-Bukhārī and Muslim on the authority of 'Abū Sa'īd Al-Khudriy: “... and do not increase one over the other”.

The reason for this ruling is to avoid the possibility of circumventing the Law by trading low quality goods for high quality goods. In this regard, exchanges rarely involve exactly identical goods, thus allowing increase for a difference in quality will make it possible always to find some small difference to justify an increase. This would clearly make *ribā al-fadl* easily implementable. Thus, the prohibition of trading goods of the same genus in different amounts prevents this means of circumvention of the Law.³⁰ On the basis of this ruling, the Mālikīs have forbidden exchanging an amount of one money for another amount by weight (lit. pound-sales, *bay' al-murāṭalah*), which typically referred to trading high quality gold for low quality gold.

Moreover, workmanship in the two monies (gold and silver) does not prevent the prohibition of increase when trading for the same genus. Thus, trading raw gold for gold jewelry must be in equal weight, and any increase is forbidden *ribā*.

²⁸ Al-Kāṣānī ((Hanafi), vol.5, p.282), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.189), Al-Qarāfī ((Mālikī), vol.3, p.264 onwards), 'Ibn Juzayy ((Mālikī), p.254), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.24), 'Ibn Qudāmah (, vol.4, p.17), Al-Shāfi'i (, vol.3, p.70).

²⁹This is a later rule in the Ḥanafi school, which was considered alien to the school in the opinion of Al-Zayla'i. The notion of this ruling is derived from the *Hadīth* narrated on the authority of 'Abū Sa'īd Al-Khudriy and 'Abū Hurayrah regarding the exchange of high quality dates for low quality dates from Khaybar, where the Prophet (pbuh) said: “Do not do this; but rather sell the one type of dates, and use the price to buy the other type”, c.f. Al-Hāfiẓ Al-Zayla'i (1st edition, (*Hadīth*), vol.4, pp.36-7).

³⁰'Ibn Qayyim Al-Jawziyyah ((Ḥanbalī), vol.2, p.143), Al-Sanhūrī's *Maṣādir Al-Ḥaqq* (vol.3, p.206).

This is based on the above listed *Hadīth* narrated by Al-Bukhārī and Muslim: “Do not trade gold for gold except in equal amounts, and do not sell silver for silver except in equal amounts”. Of course, “gold” and “silver” in this *Hadīth* does not distinguish between raw metals, minted coins, or jewelry.

6. The cause of *ribā al-nasi'ah*

Ribā al-nasi'ah, which is also called *ribā al-jāhiliyyah*, comes into effect if one of the two causes of *ribā al-fadl* applies; i.e. if the two exchanged goods are both measured by weight or both measured by volume, or if the two exchanged items are of the same genus.³¹ An instance of *ribā al-nasi'ah* is when a person buys one volume of wheat in the winter for one-and-one-half volumes to be paid in the summer. In this case, the extra half volume is not compensated for in the object of sale, and is purely a compensation for time. Thus, it is called “deferment *ribā*”, since it comes into effect due to the delay in one of the two compensations. Such increase due to deferment is paid only as a compensation for the delay in payment, and such increase for deferment is forbidden whether or not the goods are measured in the same manner. In this regard, the pre-Islamic *ribā* took place when one party's debt matured, and the creditor offered him the choice of payment or increase. Such increase can lead to severe losses for the debtor, who may be driven to bankruptcy through the repeated application of this rule.

Thus, when trading goods measured in the same manner (e.g. wheat for barley), or goods of the same genus (e.g. apples for apples, barley for barley, etc.), deferment of one of the two payments is forbidden.³² Moreover, trading goods of the same genus and same amount with deferment is also not permitted based on being of the same genus and the logic provided above. Thus, *ribā al-fadl* requires the satisfaction of both conditions (same genus, different amounts), while *ribā al-nasi'ah* comes into effect with either one of them [together with deferment].

Since we have seen that unity of the genus is sufficient to bring the prohibition of *ribā al-nasi'ah* to bear on a transaction, there is no minimum amount for this *ribā*. Thus, even the trade of one handful of wheat for one or two handfuls with deferment is forbidden. This is in contrast to *ribā al-fadl* where the clause of difference in amount applies only to trades above a minimum amount. However, for the *ribā al-nasi'ah* that comes into effect due to difference in amount (e.g. an amount of wheat for a deferred amount of barley), the minimum amount

³¹ Ibn Al-Humām ((Hanafi), vol.5, p.183), Al-Kāsānī ((Hanafi), vol.5, p.279), Al-Taḥāwī ((Hanafi), p.75).

³²The reason trading one volume of wheat for two volumes of barley is permitted instantly and forbidden if one of them is deferred is thus: the first sale cannot be primarily exploitative, and forcing the trading ratio to always be unity would prevent people from having profitable barter trade. However, when one of the goods is deferred, the transaction begins to look like a loan, and the increase is suspected to be exploitative of the needy party. Thus, the increase is likely to be purely based on deferment that would render the exchange forbidden to prevent the circumvention of the prohibition of “pay or defer with increase”. However, trading wheat for coins with deferment is permitted since such deferred payments meet people's needs.

clauses come to bear, in analogy to *ribā al-fadl*. However, 'Imām Muhammad was reported to have forbidden all such transactions regardless of size, arguing that “whatever is forbidden in large quantities is forbidden in small quantities”.

7. Reasons for forbidding *ribā al-nasī'ah*

The general reason for the prohibition of *ribā al-nasī'ah* is that it is conducive to exploitation of the poor by the rich, and putting undue financial burdens on the needy. Moreover, permission of *ribā al-nasī'ah* would lead to dire economic consequences, since the resulting commodification of money and trading it in different quantities, would cause an imbalance by preventing money from serving the role of a stable numeraire. Also, in the case of foodstuffs, if profits can be made by deferment, foodstuffs may become unavailable in the markets, which may in turn lead to serious nutritional problems in society.³³

Commercial banking *ribā*

As we shall see at the end of this section, one of the most common modern *ribā* contracts takes the form of lending with interest. Such interest charges constitute illegal devouring of people's wealth, and shares all the ills and prohibitions that apply to *ribā al-nasī'ah*.³⁴ The proof of the equivalence of this interest charged over and above the principal is in the verse “But if you repent, then you shall have your principals” [2:279]. In common parlance, the term *ribā* has been restricted to the increase in owed sums due to deferment, which is the *ribā al-nasī'ah* commonly used in pre-Islamic times. In this regard, the previously mentioned *Hadīth* of “Indeed *ribā* is effected through deferment” can be understood in terms of the relatively rarity of *ribā al-fadl*.

We note that in most Islamic countries, commercial banks are not permitted to trade or invest directly. Thus, most legal systems restrict commercial banks to borrowing from depositors and lending to other clients. In this regard, the depositors receive interest payments, while the bank receives a higher interest payments from its borrowers. The difference between the two interest payments thus becomes the primary source of profit for banks, rendering them to be debt traders. The secondary job of commercial banks is the creation of credit through lending monies that they had not in fact borrowed from any person, thus lending that which it does not own.³⁵

³³ *Al-Qiyās* by 'Ibn Al-Qayyim (p.114), *Al-Jazīrī* (1986, vol.2, p.246), 'Ibn Qayyim Al-Jawziyyah ((Hanbalī), vol.2, p.137 onwards), 'Ibn ^cAbidīn ((Hanaftī), vol.4, p.189), *Al-Kāsānī* ((Hanaftī), vol.5, pp.278,286).

³⁴ *Al-Jazīrī* (1986, vol.2, p.247), '*Uṣūl Al-Buyūc Al-Mamnūc ah* by Professor ^cAbdul-Samīc (p.118).

³⁵ *Hukm Wadā'īc Al-Bunūk wa Shahādāt Al-'Istithmār fī Al-Fiqh Al-'Islāmī* by Dr. ^cAlī Al-Sālūs (p.40).

8. Unity and Diversity of Genera

As we have seen, trading in the same genus with increase is forbidden, while the Ḥanafīs permit increase when trading goods of different genera. The exception to this case is in trading the meat of birds, where trading their meats (e.g. quails for pigeons) in different quantities is permitted. In this regard, the meats of birds are not considered goods eligible for *ribā*, since they are not sold by weight or volume. On the other hand, trading the meats of chickens and geese in different quantities is forbidden, since such meats are commonly sold by weight.

The criteria for differences in genus in the Ḥanafī school are determined by considering: (i) the different origins of the goods (e.g. date vs. grape vinegar, beef vs. lamb meat, etc.); (ii) their different uses (e.g. goat hair vs. lamb wool, etc.); or (iii) effected changes in the goods (e.g. wheat measured by volume being transformed into bread that is measured by number or weight). Thus, the meats and milks of cows, camels, and sheep are considered of different genera, and may be traded in different quantities. Similarly, wheat, barley, and corn are considered to be of different genera, as are flour or wheat on the one hand and bread on the other. Also, meat and fat are considered to be two different genera, as are oil and olives, cooked and uncooked oil, etc. due to the differences of usage and other listed criteria.³⁶

Ḥanafī proofs

The Ḥanafīs asserted that the condition for eligibility to *ribā* is measurement by volume or weight. Their proof is based on the general rule that equality in the two compensations is a condition of validity for sales. In this regard, *ribā* is forbidden based on increase in one of the two traded goods without a compensation for this increase. Such criteria for prohibition apply to goods other than those mentioned in the *Hadīth* listing the six goods eligible for *ribā* (e.g. iron, etc.). In this regard, equality between two traded goods is determined in terms of form and content. The measured amount (by volume or weight) determines the form, while the genus of the traded goods determines the content. In this regard, one measure of volume is similar and equal to another equivalent measure of volume in form. Thus, if the content is the same while the measures are different, the forbidden *ribā* would be effected. This logic clearly is not restricted to foodstuffs [wheat, barley, salt and dates; as mentioned in the *Hadīth*] and monetary numeraire commodities Gold and silver, but applies equally to trading of any goods measured by volume or weight in exchange for goods of the same genus or kind.³⁷

In other words, wheat is mentioned in the above mentioned *Hadīth* as an example of valued property. As the value of such property can only be ascertained through measurement by volume, it is as if we can read the *Hadīth* as

³⁶ Ibn Al-Humām ((Ḥanafī), vol.5, p.297 onwards), 'Ibn ʻAbidīn ((Ḥanafī), vol.4, p.193 onwards).

³⁷ Al-Sarakhsī (1st edition (Ḥanafī), vol.12, p.116), Al-Kāsānī ((Ḥanafī), vol.5, p.184), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.277).

“... weighed gold for gold, wheat measured by volume for wheat, ...”. In this regard, the elimination of *ribā* is effected through the equalization of volume or weight. In this regard, since a fistful of foodstuffs, or an apple, cannot be measured exactly, they are not considered eligible for *ribā al-fadl*.³⁸ However, they are eligible for *ribā al-nasī'ah*, as seen above.

We finally note that all types of wheat are considered one genus, and the same applies to all types of barley, all types of wheat flour, all types of barley flour, all types of dates, salt, grapes, raisins, gold, silver, etc. Thus, trading any goods measured by weight or volume for goods of the same genus is not permitted except in equal volume, even if the traded goods are of different characteristics.³⁹

10.3.2 Mālikī rulings

The most accepted opinion in the Mālikī school asserts that the demarcation that determines the goods eligible for *ribā* are: (i) use as a monetary numeraire (gold and silver), and (ii) foodstuffs (wheat, barley, salt, and dates). For foodstuffs, they refine their demarcation criteria further:

- In *ribā al-nasī'ah*, all foodstuffs that are not medicinal are eligible for *ribā*, whether or not they are perishable (lit. whether they are only for consumption or for consumption or storage). Thus, all types of vegetables and fruits will be eligible for this type of *ribā*.
- For *ribā al-fadl*, the criteria are twofold: nutrition, and storability. Foodstuffs satisfy the nutrition requirement if they are sufficient to sustain life (e.g. grains, dates, raisins, meats, milks, and their products). Also appended to the nutritious foodstuffs are goods that make the food more edible (e.g. salt, spices, vinegar, onions, garlic, oil, etc.). The storability requirement is satisfied if the foodstuffs are not easily perishable, and thus may be stored for a period of time. In this regard, the length of the period for which the goods may be stored is not explicitly specified, as it depends on the relevant usage. When such a period is not explicitly specified, some jurists have argued that a period of six months to one year is implied.

Their proof for the above criteria of eligibility for *ribā* is based on the understanding that *ribā* is forbidden to prevent injustice and preserve property. In this regard, the most important properties are those on which livelihood depends, sic. foodstuffs, including grains, dates, raisins, eggs, oil, various beans, etc.⁴⁰

With regards to unity or difference in the genus, we note that 'Imām Mālik considered wheat, barley, and rye to be one genus; corn, millet, and rice to be

³⁸ *Masādir Al-Haqq* by Al-Sanhūrī.

³⁹ Al-Kāsānī ((Hanafi), vol.5, p.187), Al-Sarakhsī (1st edition (Hanafi), vol.12, p.122).

⁴⁰ Al-Bājī Al-'Andalusī (1st edition (Mālikī), vol.4, p.158), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.131), *Hāshiyat Al-Dusūqi* (vol.3, p.47), Al-Ḥaṭṭāb (1st edition (Mālikī), vol.4, p.346), Al-Jazīrī (1986, vol.2, p.251).

one genus; and beans, lentils, and other legumes to be one genus. Thus, he does not permit trading wheat for barley, or rice for corn in different quantities. Moreover, he classifies all meats into three equivalence categories: (i) meats of quadrupeds, meats of birds, and meats of fishes.⁴¹

10.3.3 Shāfi‘ī rulings

The Shāfi‘īs ruled that the criterion that renders gold and silver eligible for *ribā* is their use as monetary numeraires. In this regard, there is no differentiation between the raw metal, minted coins, or jewelry. Thus, if a man were to trade golden jewelry for gold coins, they must be of equal quantity (weight), and the value of the traded items is not considered. As for coins made of other metals (e.g. copper, bronze, nickel, etc.), they were seen to be different from gold and silver in that they were not as commonly used to define prices.

However, since fiat paper monies and various coins have become the main forms of money in recent years, I am of the opinion that they have thus become eligible for *ribā*. This is in accordance with the Ḥanafi school’s opinion.

As for the other four commodities (wheat, barley, dates, and salt) mentioned in the *Hadīth*, the Shāfi‘īs find that the criterion according to which they are eligible for *ribā* is that of being foodstuffs. In this regard, they consider three types of foodstuffs:

1. Goods used for everyday nutrition (e.g. wheat and barley), thus including in the same category items such as beans, rice, corn, and other grains eligible for *zakāh*.
2. Goods used as dessert (e.g. dates), thus including raisins, figs, etc.
3. Goods used to preserve foods and make them more edible (e.g. salt), or as medications (e.g. various medicinal herbs, etc.).

Thus, they have not differentiated between goods that are literal foodstuffs, and those that are meant to restore health, since maintaining physical health is the ultimate use of both categories. Thus, the Shāfi‘īs reduce the criteria of eligibility for *ribā* to: (i) foodstuffs, and (ii) monetary numeraire commodities. Thus, items such as iron, clothes, etc. may be traded in different weights and volumes, since they do not meet either of the two criteria.

Their proof for this ruling is the general rule: “The origin of the term used in the ruling is its criterion”. Thus, the verse “As to the thief, male or female, cut off his or her hands...” [5:38] illustrates that the reason and criterion for the imposition of the penalty is the act of theft. In this regard, a *Hadīth* was narrated on the authority of Mu‘ammar ibn ‘Abd-Allāh that he said: I heard the Messenger of Allāh say: “Trade foodstuffs for foodstuffs in equal amounts”.⁴² Thus, it is clear that edibility is the reason and criterion used to determine eligibility for *ribā*. This is a reasonable interpretation since this criterion covers the

⁴¹ Ibn Juzayy ((Mālikī), p.253).

⁴² Narrated by Muslim and ‘Alīmad on his authority, c.f. Al-Hāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.37), ‘Ibn Hajar (, p.235), Al-Shawkānī (, vol.5, p.193).

four goods mentioned in the *Hadīth*, thus highlighting the increased importance of foodstuffs, upon which life depends, as well as gold and silver monies, upon which markets are based.

As we have seen above, I depart from the traditional Shāfi‘ī position by including all modern monies, including paper currency, in the eligibility for *ribā*. On the other hand, we see how the Shāfi‘ī logic is restricted to particularly vital goods (foodstuffs and monies), while the generalization of the Hanafis covers all goods measured by weight and volume, some of which are not particularly vital.

Based on the above ruling, if foodstuffs are traded for foodstuffs of the same genus, or if monies are traded for monies of the same genus, three conditions are necessary to ensure validity of the transaction: (i) hand-to-hand trading (i.e. no deferment whatsoever may be mentioned in the contract), (ii) certainty of equality of amount (using volume for items measured that way and weight for those measured in that manner, based on the tradition in Hijāz at the time of the Prophet (pbuh), or based on convention for new goods), and (iii) mutual physical receipt prior to parting from the contract session. Note that the requirement of mutual receipt is added whether or not the traded goods are of the same genus. This is in contrast to the Hanafi opinion, and the Shāfi‘īs base this addition on the Prophet’s statement “hand-to-hand” in the *Hadīth*.

Thus, when trading goods of a different genus (e.g. wheat for barley), they may be of different amounts, but the Shāfi‘īs still require non-deferment and mutual receipt prior to parting. This is again based on the *Hadīth* narrated by Muslim: “gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt, of the same kind in the same amount, hand-to-hand; but if the kinds are different, then trade as you wish as long as it is hand-to-hand”. The non-deferment condition is thus inferred from this *Hadīth*.

However, when trading foodstuffs for non-foodstuffs (e.g. money, clothes, etc.), or when trading any non-foodstuffs and non-monetary goods one for the other (e.g. one animal for another), none of the three conditions listed above apply, since such goods are not eligible for *ribā*. The reason that animals are not eligible for *ribā* is that it is not eaten in its regular form. Further proof is provided by the tradition that ‘Ibn ‘Umar (pAbpwh) traded one camel for two according to the orders of the Prophet (pbuh).⁴³

Unity and difference in genus

If two goods share a common name (e.g. different types of dates, etc.) are considered to be of a single genus. Moreover, the Shāfi‘īs consider two goods derived from goods of the same genus (e.g. two volumes of flour from two separate volumes of wheat) to be of the same genus. In contrast, if two goods have a different name (e.g. wheat and barley), or if they are derived from goods of different genus (e.g. wheat flour and barley flour, different meats, different milks, etc.) are considered to be of different genera.

⁴³ Al-Khaṭīb Al-Shirbī (Shāfi‘ī), vol.2, pp.22-25), Al-Qalyūbī (Shāfi‘ī), vol.2, p.167 onwards), Al-Sharqāwī (Shāfi‘ī), vol.2, p.23 onwards), ’Abū-’Ishāq Al-Shīrāzī (Shāfi‘ī), vol.1, p.272).

Thus, it is permitted to trade wheat flour for barley flour, gold for silver, dates for raisins, date vinegar for grape vinegar, beef for lamb, etc. in different quantities. Moreover, the liver, heart, and other organs of the same animal are considered to be of different genera, and thus may be traded in different quantities. Similarly, fats, bones, and meats from different parts of the animal are considered to be of different genera. In fruits and vegetables, green and yellow watermelons are considered different genera; and different types of cucumbers (Egyptian (*qithħā*) vs. regular (*khiyār*)) are considered to be of different genera. However, all types of sparrows are considered one genus, all types of ducks one genus, and all types of pigeons one genus.⁴⁴ Fresh and dried fruits of the same genus (e.g. fresh dates and dried dates, grapes and raisins, etc.) are considered to be one genus. Similarly, all derivatives of wheat (flour, cracked wheat, bulgur, etc.) are considered to be one genus. Finally, lambs and goat are of the same genus, cows and water-buffalo are of the same genus, etc., while meats and milks from the various groups are considered to be of different genera.

10.3.4 Hanbalī rulings

There are three reported Hanbalī opinions on the criteria of eligibility for *ribā*, the most widely supported of which agrees with the Ḥanafī criteria of measurability by weight or volume, together with unity of the genus. Thus, they render all goods (edible or not) eligible for *ribā* if they are measured by weight or volume, while rendering foodstuffs that are measured by other means ineligible for *ribā*. This opinion is based on the *Hadīth* narrated on the authority of 'Ibn 'Umar that the Messenger of Allāh (pbuh) said: "Do not trade one *Dinār* for two, one *Dirham* for two, or one volume of food for two, for I fear that you may fall into *ribā*". A man addressed him by saying: "O, Messenger of Allāh, would you allow a man to trade one horse for many, and one camel for many?", and he (pbuh) replied: "That is permitted, as long as it is hand-to-hand".⁴⁵ Also, 'Anas narrated that the Prophet (pbuh) said: "Whatever is measured by weight must be traded for goods of the same genus only in equal quantities, and the same applies to goods measured by volume. However, if the goods are of different genera, there is no harm in trading in different quantities".⁴⁶

The Hanbalis disagreed with the Ḥanafis, however, by forbidding *ribā al-fadl* for goods measurable by volume or weight no matter how small the quantity (including in trading a single date, and very small amounts of gold and silver).

A second reported opinion in the Ḥanbalī school agrees completely with the Shāfi'ī opinion. The third reported opinion restricts eligibility for *ribā* for

⁴⁴ Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.23 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.272).

⁴⁵ Narrated by 'Ahmad and Al-Tabarānī in *Al-Kabīr*. al-Haythamī said that its chain of narration contains 'Abū Junāb, who is trustworthy but was known to cheat; c.f. 'Ibn Al-'Athīr Al-Jazarī (, vol.1, p.469), Al-Haythamī (, vol.4, p.113), Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.56).

⁴⁶ Narrated by Al-Dāraqutnī on the authority of Al-Ḥasan having heard it from 'Ubādah and 'Anas ibn Mālik, c.f. Al-Shawkānī (, vol.5, p.193).

goods other than gold and silver to foodstuffs that are measured by weight or volume. Thus, according to this opinion, fruits and other foodstuffs that are not measured by weight or volume are not eligible for *ribā*, and neither are non-foodstuffs that are measured thus (e.g. iron, etc.). This is the opinion of Sa‘īd ibn Al-Musayyab.⁴⁷ The proof for this third opinion is based on the *Hadīth*: “There is no *ribā* except in foodstuffs (eaten or drunk) that are measured by volume or weight”.⁴⁸

Unity and difference in genus

The Ḥanbalīs agree with the Shāfi‘īs on this regard. Thus, they said:⁴⁹ “Any two kinds that share a primary name are of the same genus (e.g. different types of dates). Any two goods that share the same genus may not be traded in different quantities, even if they are of different kinds. This is based on the *Hadīth*: ‘dates for dates in equal quantities’, thus considering different types of dates equivalent due to the unity of their genus. Thus, when he (pbuh) said ‘if trading different kinds, then trade as you wish’ he (pbuh) actually referred to differences in genus.”

However, if two goods that share a common name are derived from goods of different genera, then they too are of different genera. They thus ruled that the origin of the goods is what matters and not their usage, in contrast to the Ḥanafī opinion. Thus, they consider all types of dates to be of the same genus, and the same oils used for different flowers to be of the same genus (due to being derived from the same origin).⁵⁰ Thus, flour and other grain products, meats and their products, milks and their products, etc. are considered to be of the same or different genera based only on whether or not they come from origins of the same or different genera.

10.3.5 Zāhirī rulings

The Zāhirīs and ’Abū Bakr ibn Al-Tayyib ruled that *ribā* and eligibility of goods thereof cannot be determined by any reasoning, and thus is restricted only to that which is listed in a Text (*nass*).⁵¹ This follows from their denial of reasoning by analogy (*qiyās*). Thus, they restrict *ribā* to the six goods mentioned in the *Hadīth*, permitting trading any other goods in different quantities and/or with deferment.

⁴⁷ Ibn Qudāmah (, vol.4, pp.3-5), ’Ibn Qayyim Al-Jawziyyah ((Ḥanbalī), vol.2, p.136 onwards), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.54).

⁴⁸ Narrated in *Sunan* by Al-Dāraqutnī on the authority of Sa‘īd ibn Al-Musayyab, that the Messenger of Allāh (pbuh) said: “There is no *ribā* except in gold or silver, or what is measured by weight or volume and is eaten or drunk”. It is a *Hadīth mursal*, also narrated by Al-Bayhaqī, c.f. Al-Ḥāfiẓ Al-Zaylācī (1st edition, (Hadīth), vol.4, p.36).

⁴⁹ Ibn Qudāmah (, vol.4, p.20), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.55).

⁵⁰ This is in contrast to the Ḥanafīs who consider goods of the same origin of different genera if their usage is different. For instance, they allow trading olive oil for olives, and cooked oil for uncooked, etc. in different weights based on classifying them as different genera, c.f. ’Ibn ʻĀbidīn ((Ḥanafī), vol.4, p.194).

⁵¹ Ibn Hazm (, vol.8, p.468).

In summary, the criteria of eligibility of foodstuffs for *ribā* is: measurability by volume or weight for the Ḥanafīs and Ḥanbalīs, edibility and storability for the Mālikīs, and edibility for the Shāfi‘īs.

Thus, the Mālikīs and Shāfi‘īs permit trading in equal quantities for goods other than the two monies and foodstuffs, and the Ḥanafīs and Ḥanbalīs permit such unequal trading for any goods (including foodstuffs) that are not measured by weight or volume. Such permissions are based on varying understandings that those goods rendered ineligible for *ribā* are not essential for people's livelihood and economic activities. Thus, avarice and profit seeking while trading such goods would not lead to major social or physical harm.

10.3.6 Juristic Preference (*tarjīḥ*)

Ibn Rushd of the Mālikī school said:

However, if we reflect on the essence of this problem – and Allāh only knows best – we find that the Ḥanafi reasoning is the best. This follows since it is clear in the Law that what is intended by the prohibition of *ribā* is avoidance of the major injustice in which it results. In this regard, equity (*‘adl*) in transactions is attained through approaching equality. Since it is difficult to attain equality in things of different types, gold and silver coins were made to measure its value. Now, since varying objects that are not measured by volume and weight (e.g. clothes) attain equality by equating the ratios of the values of each traded item to its genus, we can see that differences in amount can be a requirement of equity. However, for goods measured by weight and volume, equity is indeed attained through equating the volume or weight.”⁵²

However, this opinion clearly enlarges the scope of *ribā* excessively by means of reasoning that is not supported by logic or reference to earlier opinions.

Ibn Al-Qayyim preferred ‘Imām Mālik’s criteria based on edibility and storability for goods other than the two monies. For the two monies, he accepts the Shāfi‘ī logic based on their use as monetary numeraires. In this regard, if iron and copper were viewed to be eligible for *ribā*, their sale on a deferred basis with an immediate cash price (in gold or silver) would not be permitted. This follows since goods that are eligible for *ribā* may be traded for other such goods of a different genus in different quantities, but not with deferment.

Moreover, he argued, inferring from the prohibition of trading gold and silver in different quantities or with deferment that measurement by weight is a criterion of eligibility for *ribā* is not as valid as the reasoning based on those metals being used as monetary numeraires. In this regard, the argument based on being used as numeraires by means of which prices are determined rests on the need for stable prices that do not move erratically based on market conditions

⁵²Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.131).

while there is no equivalent logic for the argument based on measurability by weight.⁵³

Professor ^cAbdul-Razzāq Al-Sanhūrī preferred the Shāfi‘ī ruling on the criteria of eligibility for *ribā* by considering the socio-economic underpinnings of that opinion. In this regard, he finds that the Shāfi‘ī inference generalizes the *Hadīth* just to the appropriate end based on the basic socio-economic consequences of *ribā*. On the other hand, the Ḥanafī opinion can be seen to be excessively logical, concerned mainly with form rather than content.⁵⁴

10.4 Basic types of *ribā*

'Ibn Rushd enumerated five types of *ribā*: (i) defer and increase, (ii) increase in amount, (iii) deferment, (iv) reduction due to pre-payment, and (v) re-sale of foodstuffs prior to their receipt. Since we have already discussed all but the first and fourth types, I shall discuss those two at this point.

10.4.1 Defer and increase

This type of *ribā* is effected when a man is indebted to another, and they agree to increase the amount owed in compensation for deferring the payment date. This is a form of pre-Islamic *ribā*. All jurists agree that it is strictly forbidden regardless of whether the debt resulted from a loan or a sale, and whether the debt was foodstuffs or monies. A means by which this type of *ribā* may be effected to circumvent the law is where the creditor sells the debtor a good for a deferred price higher than its cash price.

10.4.2 Reduction due to pre-payment

Accepting a smaller amount than the face value of a debt to receive it earlier, if it is mentioned in a loan contract, is forbidden by the leaders of all four juristic schools. In this regard, a reduction of the liability based on prepayment is very similar to increasing it based on deferment.

Instances of this type of behavior include: a debtor making a smaller prepayment in lieu of a larger debt that had not matured, prepaying part of the debt and deferring the rest, or accepting a prepayment that is partly monetary and partly in-kind. Jurists agree that all such arrangements are permissible by mutual consent *ex post*, including a prepayment in-kind that is of value lower than the face value of the debt.⁵⁵

⁵³'Ibn Qayyim Al-Jawziyyah ((Hanbali), vol.2, p.137).

⁵⁴*Maṣādir Al-Haqq* (vol.3, p.184).

⁵⁵'Ibn Juzayy ((Mālikī), pp.252,289), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, pp.127,142), 'Ibn Qayyim Al-Jawziyyah ((Hanbali), vol.2, p.135), *Al-Ribā wa Al-Mu‘āmalāt fī Al-'Islām* by Sheikl Rashīd Ridā.

10.5 Conditions for trading goods eligible for *ribā*

If goods eligible for *ribā* are traded one for another, the transaction may be permitted and maybe prohibited, depending on the context. In the case of trading goods of the same genus (e.g. gold for gold, silver for silver, corn for corn, etc.), the sale is permitted if three conditions are met:

1. Equality of volume, weight, or number, using the appropriate measure for the relevant goods. Thus, trading a pound of apples for a pound of apples, or five coconuts for five coconuts, is permissible. For goods that vary depending on degrees of moisture and dryness, equality is determined in the dried state. Thus, it is not permitted to trade fresh dates for fresh dates, or fresh dates for dried dates.
2. The contract must not allow for the deferment of either traded good.
3. The traded goods must be mutually received during the contract session, prior to parting.

The above conditions are all inferred from the above-mentioned *Hadīths'* mention of “in equal amounts” and “hand to hand”. If one or more of those three conditions are not met, the transaction is forbidden.

In the case of trading goods of different genera that share the same criteria of eligibility for *ribā* (e.g. trading gold for silver, or wheat for barley), then two conditions must be met:

1. The contract must not allow for the deferment of either traded good.
2. The traded goods must be mutually received during the contract session, prior to parting.

In this case, equality of the amounts traded is not required, based on the above-mentioned *Hadīth* “but when trading goods of different kinds, trade as you wish as long as it is hand-to-hand”. If either of the two listed conditions is violated, the trade is forbidden.

The third category of trades are where the genera are different and the criteria of eligibility of *ribā* are different (e.g. trading gold dates, silver for raisins, etc.), then the sale is permitted. In this case, equality of amount is not required (e.g. 10 grams of gold for a pound of wheat). Moreover, deferment is allowed, and the sale is concluded whether or not mutual receipt is effected. This is based on the *Hadīth* narrated by Al-Bukhārī and Muslim on the authority of 'Abū Sa'īd Al-Khudriy and 'Abū Hurayrah that “the Prophet (pbuh) sent a man to Khaybar, and he returned with high quality dates. He (pbuh) asked him: ‘are all of Khaybar’s dates this good?’. The man answered: ‘No, oh Messenger of Allāh, we trade one volume of high quality dates for two volumes of lower quality dates, and two volumes of high quality for three of the low quality’. The

Prophet (pbuh) said: 'Do not do this. Instead, sell the lower quality dates for money, and use the proceeds to buy the high quality dates'."

If goods eligible for *ribā* are traded for other types of goods (e.g. gold for base metals, etc.), then the sale is permitted unconditionally. Thus, equality of amount, lack of deferment, and mutual receipt are not required in such contract. In this case, since one of the two traded goods is not eligible for *ribā*, the contract is itself not subject to *ribā* (*ghayr ribawi*). This is in agreement also with the case where the criteria of eligibility for *ribā* were different (e.g. gold for rice), in which case the sale was permitted unconditionally.

We have seen previously that trading fresh dates for dried dates, or new kernels of wheat for dried kernels, is forbidden, since they are goods eligible for *ribā* and equality of amount is not satisfied. We recall here two other special cases that were studied by jurists:

1. *Bay^c al-muzābanah* is where fresh dates on their palms (thus, of unknown quantity) are traded for cut dates, or grapes are traded for raisins.
2. *Bay^c al-muhāqalah* is where grains in their kernels are traded for an amount estimated to be equal.

We have seen previously that Islām permitted *bay^c al-arāyā*, which involves trading fresh dates on the palms for an amount of dried dates estimated to be of equal quantity, or fresh grapes for an estimated equivalent amount of raisins, as long as the weight was less than 653Kgs. In this regard, Al-Bukhārī and Muslim narrated on the authority of Sahl ibn 'Abī Ḥathmāh (mAbpwh) that "the Prophet (pbuh) forbade trading fresh dates for dried dates, but allowed for fresh dates on the trees to be traded for an amount estimated to be equal, so that the buyers can eat them fresh". We have seen that this is the opinion of non-Ḥanafī jurists.

10.6 Consequences of differences in *ribā* criteria

The differences of opinion between the Ḥanafīs and the Shāfi'īs with regards to the criteria of eligibility for *ribā* result in a number of consequences, which we classify with respect to *ribā al-fadl* and *ribā al-nasi'ah*.

10.6.1 Consequences relating to *ribā al-fadl*

1. Trading small unmeasured amounts of foodstuffs for foodstuffs of the same genus (e.g. a handful of wheat for two handfuls, one walnut for two, etc.) is permitted for the Ḥanafīs due to non-satisfaction of the quantity criterion, since such small volumes (less than half a *sā'*) or small weights (less than a *habbah*) are all considered equivalent.⁵⁶

⁵⁶ Al-Sarakhsī (1st edition (Hanafi), vol.12, p.114), 'Ibn Al-Humām ((Hanafi), vol.5, p.278 onwards), Al-Kāsānī ((Hanafi), vol.5, p.185), 'Ibn 'Abidīn ((Hanafi), vol.4, p.188).

On the other hand, trading a fistful of grains for two is not permissible for the Shāfi‘īs, since a criterion of eligibility for *ribā* (namely, edibility). In this regard, they take as fundamental the prohibition of trading foodstuffs in different quantities based on the *Hadīth*: “Foodstuffs for foodstuffs in equal amounts”. Thus, the only consideration in this case is that the goods are foodstuffs traded in different quantities, without consideration for the actual amounts. The Ḥanafīs, on the other hand, restrict the applicability of the text of the *Hadīth*: “Wheat for wheat in equal amounts...”,⁵⁷ thus permitting trading one fistful of grains for two.

2. The different criteria of eligibility for *ribā* result in differences of opinion over the legal status of trading measured goods for goods of the same genus, when they are not foodstuffs (e.g. a volume of gypsum for two, or a pound of iron for two pounds, etc.):
 - The Ḥanafīs render such trading impermissible based on their criterion of eligibility of *ribā* (unity of the genus, and measurability by volume or weight).⁵⁸
 - On the other hand, the Shāfi‘īs permit such trading, since neither of their criteria of eligibility for *ribā* (foodstuffs and monetary numéraires) is satisfied.
 - The Ḥanafīs and Shāfi‘īs agree that trading one volume of rice for two is not permitted. Such a trade is forbidden for the Ḥanafīs due to unity of the genus and measurability by volume, and for the Shāfi‘īs based on unity of genus and edibility.
 - Similarly, the two schools also agree that trading a pound of saffron for two, or one pound of sugar for two, where the Ḥanafi criterion of measurability by weight comes to bear.

Jurists differed over the satisfaction of the criterion of unity of the genus. Among the points they discuss are the following:

1. Trading flour for flour or grains

The Ḥanafīs ruled that trading flour for flour of the same genus or the grain from which it was made is forbidden. Thus trading wheat flour for wheat or corn flour for corn is forbidden, regardless of the amount since equality of the amount cannot be determined in such trades. However, they permitted trading flour from one grain for a volume of a different grain (e.g. wheat flour for corn) as long as it is performed hand-to-hand. Finally, trading flour of some grain for flour of the same grain requires equality in volume, and fineness.

The Ḥanafīs also permitted trading bread for wheat or flour, and vice versa, in equal or different amounts. In this regard, the process of turning the flour into

⁵⁷ Ibn Al-Humām ((Hanafi), vol.5, p.276).

⁵⁸ Al-Sarakhsī (1st edition (Hanafi), vol.12, p.114), Al-Kāsānī ((Hanafi), vol.5, p.185), 'Ibn Al-Humām ((Hanafi), vol.5, p.279), 'Ibn 'Abidīn ((Hanafi), vol.4, p.188).

bread rendered it a different genus, to the point of being measured by means other than volume. Thus, they may be traded in different quantities and/or with deferment, and mutual receipt is not required. The only requirement in this regard is identification of the traded goods.⁵⁹

The Mālikīs ruled that grains may not be traded for flour of the same grain except in equal amounts. On the other hand, trading grains for flour from another grain is permitted in different quantities provided that mutual receipt is concluded prior to parting from the contract session. They also permitted trading bread for wheat, arguing that the process of making the bread rendered it into a different genus. On the other hand, they categorically forbade trading flour for flour of the same grain.⁶⁰

The Shāfi‘īs also categorically forbade trading flour for flour of the same grain, arguing that it is impossible to ensure equality of the amount and type. They also rendered as invalid trading grains for flour made of the same grains, as well as bread for grains or flour of the same genus from which the bread was made. On the other hand, they permitted trading bread for bread, or flour for flour, if they come from grains of different genera.⁶¹

The Ḥanbalīs categorically forbade trading flour for grains of the same genus, as well as bread for the grains or flour from which it was made. In all such trading, equality of amount is required, but cannot be ensured. However, they agree with the Ḥanafīs in permitting trading flour for flour of the same grain as long as they are of the same fineness and amount.⁶² In summary, this final type of trade is permitted, subject to equality in quantity and quality, by the Ḥanafīs and Ḥanbalīs, while such trading is categorically forbidden by the Shāfi‘īs and Mālikīs.

2. Trading an animal for meat

’Abū Ḥanīfa and ’Abū Yūsuf ruled that an edible animal may be traded for meat from an animal of the same genus. They analyze such a sale as trading goods measurable by weight for goods that are not, which is permitted subject to the identification condition. In other words, animals are regarded as goods not eligible for *ribā*.⁶³

The other three non-Ḥanafī schools ruled that trading an edible animal for meat from an animal of the same genus is not permitted. Thus, it is not permissible to trade a sheep’s meat for another sheep intended for slaughter and eating.⁶⁴ This opinion is based on the narrated *Hadīth* narrated on the au-

⁵⁹ Al-Kāsānī ((Ḥanafī), vol.5, p.189), ’Ibn Al-Humām ((Ḥanafī), vol.5, p.288 onwards), ’Ibn ʻĀbidīn ((Ḥanafī), vol.4, p.194 onwards), Al-Jazīrī (1986, vol.2, p.254).

⁶⁰ ’Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.136), *Hāshiyat Al-Dusūqī* (vol.3, p.53), Al-Jazīrī (1986, vol.2, p.253).

⁶¹ ’Abū ’Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.271), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.23), Al-Jazīrī (1986, vol.2, p.255).

⁶² ’Ibn Qudāmah (, vol.4, p.24), Al-Jazīrī (1986, vol.2, p.255).

⁶³ ’Ibn Al-Humām ((Ḥanafī), vol.5, p.290), ’Ibn ʻĀbidīn ((Ḥanafī), vol.4, p.192), Al-Kāsānī ((Ḥanafī), vol.5, p.189).

⁶⁴ ’Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.136), *Hāshiyat Al-Dusūqī* (vol.3, p.54; vol.1,

thority of Sa‘īd ibn Al-Musayyib that the Prophet (pbuh) forbade trading an animal for meat.⁶⁵ Another narration states that the Prophet (pbuh) forbade trading a live animal for a dead one.⁶⁶ In this regard, meat is a good eligible for *ribā*, and in this contract, it is traded for a good of the same genus as its origin. This is based on the juristic rule that inequality is assumed if equality cannot be ensured.⁶⁷

On the other hand, trading an animal for another, of the same or different genera, and in the same or different number, are all allowed. In this case, animals per se are not goods eligible for *ribā* since they are not edible in their live form, and of course, they are not monetary numeraires. Finally, trading meat for meat is permitted for the same genus if they are of equal amount, the contract does not allow for deferment, and mutual receipt is affected during the contract session. Trading meats of different genera (e.g. lamb for beef) is permitted in different quantities, under the other two conditions of non-deferment and mutual receipt.

10.6.2 Consequences relating to *ribā al-nasi‘ah*

There are two main sources of differences of opinion between the Ḥanafīs and the Shāfi‘īs, and we shall list various differences under those two categories:

1. Consequences of eligibility for *ribā*

As we have seen previously, for goods other than monetary numeraires, the criterion of eligibility for *ribā* is measurability by volume or weight for the Ḥanafīs, and edibility for the Shāfi‘īs. In this regard, both schools agree that if a man sells a volume of wheat for a volume of barley with deferment, or with the price being an identified fungible liability, then the criterion for *ribā al-nasi‘ah* is satisfied for both schools, and the sale is rendered invalid. In the latter case, a known and identified good is found to be better than a fungible liability, thus resulting in *ribā*. The Ḥanafīs render this trade *ribā* based on measurability by volume, and the Shāfi‘īs render it *ribā* based on edibility of wheat and barley. Similarly trading a pound of sugar for a pound of saffron established as a liability on the buyer is not permitted in both schools based on the criterion of measurability by weight for the Ḥanafīs and edibility for the Shāfi‘īs.

p.272), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.29),. Mar‘ī ibn Yūsuf (1st printing (Ḩanbalī), vol.4, p.32), ‘Ibn Qayyim Al-Jawziyyah ((Ḩanbalī), vol.2, p.145).

⁶⁵Narrated by Mālik in *Al-Muwatta'* as a *Hadīth mursal* on the authority of Sa‘īd ibn Al-Musayyib. Other narrations are available in Al-Bazzār on the authority of ‘Ibn ‘Umar, in Al-Ḥākim, Al-Bayhaqī and ‘Ibn Khuzaymah on the authority of Al-Ḥasan and Samurah. It is also narrated as “he (pbuh) forbade trading a dead animal for a live one”. Al-Shawkānī (, vol.4, p.203), states that “this *Hadīth*, considering its many chains of narration, rises to the level of citing as a text”, c.f. ‘Ibn Al-‘Aṣḥāb Al-Jazarī (, vol.1, p.413), Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.39).

⁶⁶Narrated by Al-Bayhaqī on the authority of a man from Madīnah, and stated that it is a *Hadīth mursal*, referring to the above listed narration, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.39).

⁶⁷Takhrīj Al-Furū‘ c-alā Al-’Usūl (p.71).

The two schools differ in two cases:

1. Sales of non-foodstuffs (e.g. when trading a volume of gypsum for a volume of arsenic) with deferment (e.g. through a *salam* contract), or without but with a price established as a liability on the buyer, are rendered impermissible for the Ḥanafīs based on measurability by volume, but they are permitted by the Shāfiʻīs since the goods are not foodstuffs or monies. Similarly, a *salam* of two pounds of iron with an immediate price of one pound is impermissible for the Ḥanafīs based on measurability by weight and unity of the genus, while the Shāfiʻīs render it permissible.

Mixing foodstuffs and non-foodstuffs, a *salam* in which the immediate price is monetary and the (deferred) object of sale is saffron, cotton, or iron, is permitted in both schools, since none of the criteria of eligibility for *ribā* are satisfied. To elaborate, the traded goods in such a contract are of different genera, and they are measured in different units of weight.

On the other hand, a *salam* in which silver nugget is traded for a similar gold nugget, or gold dust is traded for a silver nugget, etc. is not permitted for both schools. The Ḥanafīs forbid this transaction based on measurability of gold and silver by the same units of weight. The Shāfiʻīs, on the other hand, forbid it based on both metals (in all their forms) being considered monetary numeraires.

2. The two schools differ in certain cases of trading foodstuffs with different methods of measurement. Thus, the Ḥanafīs permit *salam* contracts in which wheat is traded for oil, since one is measured by weight and the other by volume. However, the Shāfiʻīs forbid such transactions since both goods are foodstuffs.

2. Consequences of genus classification

We have previously shown that genus by itself can constitute a criterion of eligibility for *ribā* in the Ḥanafī school. This follows since their criterion is unity of the genus and measurability by weight or volume. Since both components of this criterion are necessary for effecting *ribā*, each one is considered a cornerstone of the criterion, rather than a mere condition.⁶⁸

For Al-ʻImām Al-Shāfiʻī, genus is merely a condition according to which prohibition or lack thereof is determined, but is not a criterion of eligibility by itself. This is analogous to marital status being a condition for applying the stoning penalty to a married adulterer. However, in the case of *ribā*, the criteria of eligibility are edibility (to protect man's nourishment), and monetary numeraires (to protect market stability). Since the genus of the goods is not directly mentioned in those criteria, it is considered a condition, and not a cornerstone of the Shāfiʻī criterion.

⁶⁸Ibn Al-Humām ((Ḥanafī), vol.5, p.276,280), Al-Sarakhsī (1st edition (Ḥanafī), vol.12, p.122 onwards), Al-Ṭahāwī ((Ḥanafī), p.75), 'Abū-'Ishāq Al-Shīrāzī ((Shāfiʻī), vol.1, p.271 onwards).

This distinction between the two school's treatment of the genus aspect in *ribā* results in a number of similarities and differences in juristic rulings:

- Both schools do not allow *salam* contracts in which walnuts are traded for walnuts, eggs for eggs, apples for apples, a fistful of wheat for a fistful of wheat, etc. The prohibition is based on the genus criterion for the Ḥanafīs and the foodstuffs criterion for the Shāfi‘īs.
- On the other hand, a *salam* contract in which a cloth is traded for an identical cloth is not permitted for the Ḥanafīs (based on unity of genus), while it is permitted for the Shāfi‘īs since their school does not allow genus alone to effect forbidden *ribā*.
- Of course, both schools permit a *salam* contract in which one type of cloth is traded for another, since none of the criteria of eligibility for *ribā* would be satisfied in this case.
- At the other extreme, both schools forbid *salam* contracts in which monies are traded for monies, based on the genus criterion for the Ḥanafīs and usage as monetary numeraires for the Shāfi‘īs.

The Ḥanafi logic for making unity of the genus alone a criterion for effecting forbidden *ribā* (e.g. in trading a deferred delivery of an animal for an immediate delivery of an animal) is the need to effect equity in trading. In this regard, equity between immediate delivery and deferred delivery cannot be effected, since a known available object is always better than a deferred liability to deliver such an object in two respects: (i) an identified object is better than one described as a liability, and (ii) an immediately available object is preferred to the same object deferred. For the Ḥanafīs, this logic applies to many goods other than foodstuffs and monies. Their logic is further supported by the *Hadīths* “indeed, there is no *ribā* except with deferment”, and “indeed, *ribā* is in deferment”.⁶⁹ This text is general, thus making no distinctions between foodstuffs and monetary numeraires on the one side and other goods on the other. Thus, they ruled based on this *Hadīth* as well as their logic that deferment together with unity of the genus results in forbidden *ribā*.⁷⁰

Mālik ruled that trading an animal for an animal with deferment if the two animals have similar uses (e.g. two milk-producing sheep). However, he permits such trading if the two animals have different usage (e.g. a male camel used for reproduction for two camels used for transportation). In the first case, he

⁶⁹This is a valid *Hadīth* narrated by Al-Bukhārī, Muslim and Al-Nasā’ī. It was narrated with different wording, including “*ribā* is in deferment”, “indeed *ribā* is in deferment”, and “there is no *ribā* in hand-to-hand transactions”. Al-Bayhaqī conjectured that the narrator may have abbreviated the *Hadīth*, where the Prophet (pbuh) may have been asked about *ribā* in trading two different goods (gold for silver or dates for wheat), and replied that “indeed, *ribā* is only in deferment”, and the narrator may have included only the final response without narrating the context of the question eliciting that statement, c.f. ‘Ibn Al-‘Athīr Al-Jazarī (, vol.1, p.469), Al-Hāfiẓ Al-Zaylānī (1st edition, (*Hadīth*), vol.4, p.37).

⁷⁰Al-Kāsānī ((Ḥanafi), vol.5, p.187).

justifies the prohibition on avoidance of potential means to circumvent the law (*saddan lil-dharā'i*).

The Shāfi'īs, on the other hand, ruled that any goods other than gold, silver, and foodstuffs (eaten or drunk) may be traded without mutual receipt during the contract session. Their opinion is based on the *Hadīth* narrated on the authority of ^cAbd-Allāh ibn ^cAmr ibn Al-^cĀṣ: "I was ordered by the Messenger of Allāh (pbuh) to prepare an army. When I ran out of camels, he ordered me to use the charitable properties,⁷¹ and I traded each one of those camels for two".⁷²

It is also narrated that ^cAli (mAbpwh) traded one camel for twenty camels deferred.⁷³ Another narration states that 'Ibn ^cUmar (mAbpwh) traded one camel for four deferred,⁷⁴ and there are many other instances of similar trading by companions of the Prophet (pbuh).⁷⁵

There are four reported opinions of 'Imām 'Ahmad,⁷⁶ the most correct of them is in accordance with the Shāfi'ī opinion (i.e. permitting trading animals for animals of the same or different genus, in equal or different numbers, and with or without deferment). Finally, we point out that all four schools agreed that trading animals in different numbers without deferment is permitted.

10.7 Reasons for prohibiting *ribā*

There is no doubt that the pre-Islamic *ribā al-nasī'ah* is fundamentally forbidden to prevent major injustice between the two sides of an economic transaction. Such injustice may result based on significant price fluctuations, or any of a number of other considerations. Moreover, there is a very real danger of exploitation of poor debtors by creditors, which Islām strives to eliminate. *Ribā al-fadl* is forbidden, at least to ensure that the law forbidding *ribā al-nasī'ah* is not easily circumvented. In this regard, what is fundamentally forbidden may not be permitted except for absolute necessity (*darūrah*), while that which is forbidden to prevent circumvention of the law (*saddan lil-dharā'i*) may be permitted for need, or to effect a benefit that exceeds its harm.⁷⁷ In this regard,

⁷¹ *Sharḥ Al-Siyar Al-Kabīr* (vol.3, p.223; vol.4, p.188), Al-Sarakhsī (1st edition (Hanafī), vol.10, p.95).

⁷² Narrated by 'Ahmad, 'Abū Dāwūd, Al-Dāraqutnī, and Al-Hākim in his *Al-Mustadrak*. The latter rendered it a valid *Hadīth* based on the methodology of Muslim, although neither Muslim nor Al-Bukhārī narrated it. Some narrators rendered it weak based on having Muḥammad ibn 'Ishāq in its chain of narration. However, 'Ibn Hajar rendered its chain of narration strong, and Al-Bayhaqī narrated it in his *Sunan* on the authority of ^cAmr ibn Shu'ayb, his father, and grandfather; c.f. Al-Hāfiẓ Al-Zaylaī (1st edition, (Hadīth), vol.4, p.47), Al-Shawkānī (, vol.5, p.304), 'Ibn Al-'Athīr Al-Jazarī (, vol.1, p.473).

⁷³ Narrated by Mālik in *Al-Muwatta'*, c.f. Al-Suyūṭī (b, vol.2, p.148), 'Ibn Al-'Athīr Al-Jazarī (, vol.1, p.474).

⁷⁴ Narrated by Mālik and Al-Bukhārī on the authority of ^cAbd-Allāh ibn ^cUmar (ibid.).

⁷⁵ 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.271).

⁷⁶ 'Ibn Qudāmah (, vol.4, p.11 onwards).

⁷⁷ *Al-Ribā wa Al-Mu'amalāt Al-Māliyyah* by Rashīd Ridā (pp.97,99, and the introduction (p.5) by Professor Bahgat Al-Bitār. See also Dr. Al-Zuhaylī's *Nazariyyat Al-Darurah Al-Shari'iyah* for the distinction between needs and necessities.

each Muslim needs to determine for himself or herself the degree of necessity or need that affects them.

It may also be argued that *ribā al-fadl* is indeed real *ribā*, and that its prohibition is more fundamental than a mere prevention of circumventing the law forbidding *ribā al-nasī'ah*. This view is based on the *Hadīth* wherein the Prophet (pbuh) said to Bilāl: “This is precisely *ribā*” when he sold two volumes of low quality dates for one volume of high quality. In this regard, *ribā al-fadl* oftentimes relies on people’s ignorance of the various kinds of a commodity, and other times exploits their need for a specific kind.

10.7.1 *Ribā* in loans

We have discussed so far the type of *ribā* that ensues in sales (be it *ribā al-fadl* or *ribā al-nasī'ah*). However, *ribā* may also be effected in a loan, whereby a person lends another a sum of money with a condition that he returns it with increase (interest), or where the convention is that loans are repaid with such interest. This is the current practice of commercial banks and many merchants who trade on people’s behalf. All such practices are prohibited (*harām*) based on the verse: “But Allāh has permitted sale and forbidden *ribā*” [2:275], as well as the verse: “But if you repent, then you shall have your principals, without inflicting or being a victim of injustice” [2:279]. The end of the last verse refers to inflicting injustice by taking more than the principal, and being a victim of injustice if the creditor receives less than the principal.⁷⁸ Allāh has made devouring *ribā* one of the seven most egregious sins (*al-sab' al-mūbiqāt*) in the *Hadīth* narrated by Al-Bukhārī and Muslim on the authority of Abū Hurayrah.

In this regard, *ribā* is forbidden in all parts of the world, be they Muslim lands or lands of war. This follows since the prohibiting texts did not specify any time, space, or other restrictions.

There have been accounts that ’Abū Ḥanīfa and Muhammad permitted taking the money of a non-Muslim in the land of war, even if that is effected through a defective contract such as *ribā*, as long as it is not done with any deception or betrayal of trust. This ruling is based on the logic that an enemy of Islam’s wealth is permissible to Muslims in analogy to his life. In the case of a *ribā* contract, the enemy of Islam would have given away his money with his own free will, thus removing any restriction for a Muslim from taking that money.⁷⁹

Some Muslims have wrongly deviated from the right path by depositing their monies in non-Muslim countries, thus permitting taking interest from such sources based on the above-mentioned opinion. However, **this is a wrong understanding of the ruling, which resulted in impermissible, invalid**

⁷⁸Tr: Thus, “*lā tazlimūna wa lā tuzlamūn*” may be properly translated as “without increase or diminution. Contrast this with the faulty translation in A. Yusuf ‘Ali (1991, p.116): “But if ye turn back, ye shall have your capital sums; Deal not unjustly and ye shall not be dealt with unjustly”, which misses the meaning that both increase and diminution are forms of injustice.

⁷⁹*Sharh Al-Siyar Al-Kabīr* (vol.3, p.223; vol.4, p.188), Al-Sarakhsī (1st edition (Hanafi), vol.10, p.95).

and forbidden actions. The wrong understanding deviates from the ruling in three respects:

1. The *ribā* relevant to this ruling is the *ribā* of contracts (through sales), and not the *ribā* of bank interest.
2. The opinion relates to taking the money of enemies of Islam, while in this faulty practice, the Muslims are giving their monies to the other economies to invest them and finance their economic growth.
3. The opinion relates to the money of enemies of Islam, which requires that the person dwell in a country that is effectively or legally at war with the land of Islam. This only applies to those who are occupying Muslim lands, etc., but not to nations with which we have peace accords (e.g. through membership in the U.N.).

In addition, it is impermissible from the point of view of Islamic law to deposit Muslim monies in non-Muslim countries, since those monies make them economically stronger, and the only return to Muslims is a measly portion of the profits paid as interest. Moreover, as we have seen repeatedly, those monies can easily be frozen in the foreign banks, which makes depositing monies in those banks permissible only for absolute necessities to facilitate international trade.

Thus, I repeat that interest on such deposited monies are illegitimate (*harām*), and should not be mixed with the monies of Muslims. However, leaving such interest payments with those banks is not appropriate either. Thus, the correct ruling is to collect such interest if it is necessary to deposit money with non-Muslims, and to give it away in charity or for public goods such as infrastructure building, public schools and hospitals, etc. This is the ruling that was issued by the *Fatwā* Committee of Al-'Azhar in the late 1960s.

10.8 Commercial bank interest is forbidden

Contemporary media has become a stage for many strong attacks and faulty religious rulings by Muslims related to *ribā* (or interest). Those attacks aim to permit banking interest as an economic necessity that allows financial intermediaries to mobilize savings for agricultural, industrial, and other products. By paying interest to depositors and charging interest to borrowers, they argue that banks serve an indispensable financial intermediation function without which modern economies cannot function.

Among those attacks was the article of Mr. Fahmī Huwaidī in *Al-^cArabī* (no. 341, April 1987) where he reported the opinions of a religious scholar who argued for permitting banking interest. The scholar's argument was based on questioning the maxim: "Any loan that brings benefit [to the lender] is *ribā*", which was not authenticated as a *Hadīth*. This scholar, Dr. ^cAbd-Al-Mun'im Al-Nimr himself published an article that contained a religious ruling (*fatwā* permitting banking interest, c.f. *Al-'Ahrām* (June 1, 1989). Another religious ruling was issued by Dr. Muḥammad Sayyid Ṭantawī (then the *Muftī* of Egypt)

in *Al-'Ahrām* (July 12, 1989) permitting the interest baring investment certificates (issued by Al-Bank Al-'Ahli). The strongest calamity was then realized in November 1989 when Dr. Ṭanṭāwī issued another *fatwā* permitting the interest payments of investment certificates and limited banks, followed by a 1991 *fatā* permitting all banking interest in all parts of the world.

In what follows, I shall list the gradual prohibition of *ribā* in the Qur'ān, and list the authenticated *Hadīths* that elucidate clearly the nature of the forbidden *ribā*. I shall also list the position of law in a number of Arab countries, and finish by debunking the arguments of those who argue for the permissibility of modern commercial banks.⁸⁰

10.8.1 Gradual prohibition

It is well known that one of the characteristics of religious law is gradual prohibition of unacceptable conduct. For instance, the prohibition of wine proceeded in four stages, culminating in the verses [5:90-91]; and the prohibition of adultery similarly progressed in two steps, first through the incarceration of women and punishment of men [5:15-16], and then through the punishment of flagellation in [24:2]. Following the same gradual process, the prohibition of *ribā* came in four stages:

1. Reprehension of the actions of Jews who devour *ribā*: “They are fond of listening to falsehood and devouring anything forbidden” [5:42], “... in that they hindered many from Allāh’s way; and that they took *ribā* even though they were forbidden, and devoured men’s wealth wrongfully” [4:160-161].
2. Contrasting *ribā* with *zakāh* in the verse: “That which you lay out for increase (*yarbū*) through the property of others will have no increase with Allāh, but that which you lay out for *zakāh*, seeking the countenance of Allāh, it is those who will get a compensation many-fold”.
3. Condemnation of the pre-Islamic Arab behavior and prohibition of Muslims from following in their footsteps: “O you who believe, devour not *ribā* doubled and multiplied” [3:130]. The prohibition in this case is not limited to multiplication many-fold, but the mention of multiplication was mentioned since that was the actual practice. The condemned behavior was thus: a man would extend an interest free loan to another. When the debt matured, the creditor gave the debtor an option of repayment or increase in the debt, thus exchanging further deferment for an increase in the interest payment. This is in fact the practice of commercial banks, where interest payments keep getting compounded over the years as long as he does not pay. The accumulated compounded interest can certainly

⁸⁰Note that *Majma' Al-Fiqh Al-'Islāmī* of *Rābitat Al-'Ālam Al-'Islāmī* and *Majma' Al-Fiqh Al-'Islāmī* of *Munazammat Al-Mu'tamar Al-'Islāmī*, as well as *Majma' Al-Buhūth Al-'Islāmiyyah* in Cairo (1965) have all concluded that banking interest is one of the forms of the forbidden *ribā*, c.f. the two books of Dr. Muhammad Ḥāfiẓ Al-Salūs where he debunks the arguments of those who wish to permit banking interest.

exceed the principal many-fold. Those who look at interest rates of say 7% or 9%, and argue that they are low, are not aware of this compounding effect that renders them more egregious than pre-Islamic *ribā*.

4. Finally, a definitive prohibition of *ribā* was issued in [2:275-279], describing those who devour *ribā* as being engaged in a war against Allāh and his Messenger: “Those who devour *ribā* do not stand except as one whom the devil has touched with madness. That is because they say: ‘trade is like *ribā*’, but Allāh has permitted trade and forbidden *ribā*. Those who after receiving direction from their God desist shall be pardoned for the past, and their case is for Allāh [to judge]. But those who repeat the offense are companions of the hell-fire in which they will abide forever. Allāh will deprive *ribā* of all blessings, and will increase charities, for He loves not the ungrateful and the wicked” [2:275-276]. Then Allāh says most definitively: “O you who believe, fear Allāh and give up what remains of your demands for *ribā* if you are indeed believers. If you do not, then take notice of a war from Allāh and his Messenger. But if you repent, then you shall have your principals, without inflicting or receiving injustice” [2:278-279].

Many *Hadīths* followed to elucidate the nature and severity of this prohibition of *ribā*. Among them is the agreed-upon *Hadīth* (i.e. by Al-Bukhārī and Muslim), on the authority of 'Abū Hurayrah (mAbpwh), which lists devouring *ribā* among the seven most egregious sins. There are also the *Hadīth* narrated by Muslim on the authority of 'Usāma ibn Zayd that “Indeed, *ribā* is but in deferment”, and the *Hadīth* narrated by 'Abū Dāwūd and others on the authority of 'Ibn Mas'ūd and Jābir that “the Messenger of Allāh (pbuh) cursed the one who devours *ribā*, the one who pays it, the one who witnesses the contract, and the one who documents it”. We have also discussed the *Hadīth* of *ribā* in sales that lists the six commodities (and extended to those that can be inferred from the listed six) eligible for *ribā*, narrated by Muslim on the authority of 'Ubādah ibn Al-Ṣāmit: “Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt, in equal amounts, hand-to-hand. When trading goods of different kinds [among those goods], trade as you wish as long as it is hand-to-hand”. Al-Jassāṣ said in his book '*Ahkām Al-Qur'ān* (vol.1, p.467): “This *Hadīth* is considered *mutawātir* due to its many narrations and the consensus of jurists on its application”. Finally, we recall the *Hadīth* narrated by Al-Hākim on the authority of 'Ibn Mas'ūd that the Prophet (pbuh) said: “There are seventy three types of *ribā*; the least sinful of which is equivalent in sin to a man committing incest with his mother..”.

Moreover, the Muslim 'Ummah reached a consensus on the prohibition of *ribā*. Al-Mawirdī said: "...to the point that it was said that no religion ever allowed *ribā*". Evidence for this statement was taken from the verse: “and that they took *ribā* even though they were forbidden” [4:161], meaning in previous revealed books.

10.8.2 The forbidden *ribā*

There are two types of the forbidden *ribā* in Islam. The first is *ribā al-nasi'ah*, which is effected through an increase in the debt amount in compensation for deferment of its maturity. This type of *ribā* was the only one known in pre-Islamic times, and it is forbidden in Islam regardless of whether the debt ensued from a sale or a loan contract. The second type of *ribā* forbidden in Islam is the one based in the above-mentioned *Hadith* of ‘Ubādah, which lists the six commodities eligible for *ribā* in sales. This type is commonly called *ribā al-fadl*, and it was prohibited to prevent means of circumventing the law (*saddan lil-dharā’i*) that forbids *ribā al-nasi'ah*. For instance, if it were not for this prohibition, a person would be able to sell gold with a deferred price in silver with an increase containing *ribā*. This constitutes *ribā al-nasā'* in sales, which is effected through deferment of the payment in sales of certain types of commodities with certain types of prices. The goods eligible for this type of *ribā* are restricted to foodstuffs in the Shāfi‘ī school, storable foodstuffs for the Mālikīs, monetary numeraires for both Shāfi‘ī and Mālikī schools, or measurability by weight or volume for the Ḥanafis and Ḥanbalis. In this regard, we can differentiate between three types of *ribā*: (1) *ribā al-nasi'ah* is effected through deferment and increase, (2) *ribā al-nasā'* is effected through deferment without increase, and *ribā al-fadl* is effected through increase without deferment.

Note that trading wheat for barley in different quantities is not *ribā* if the goods are mutually received during the contract session. Also, trading foodstuffs for a deferred monetary price is not *ribā*, since the object of sale and price are of different genera and have different units of measurement. However, trading one pound of wheat today for one pound of wheat in one month does constitute *ribā* due to unity of the genus. Similarly, purchasing jewelry with a monetary price (even if denominated contemporary fiat paper monies) would constitute *ribā* if all or part of the price is deferred.

In summary, not all increases are *ribā*. *Ribā* is effected through increases in certain types of commodities and increases stipulated as conditions of loans, or that are customarily expected to be paid for such loans. This constitutes prohibited *ribā*. However, if the debtor decides to pay more than he borrowed, without the increase being stipulated as a condition or expected as conventional behavior, then this is not *ribā*. Indeed, it would be ludicrous to say that the Prophet (pbuh) engaged in *ribā* based on his statement: “The best among you are the best in repaying their debts”.

10.8.3 Commercial bank *ribā*

Commercial bank interest is a form of *ribā al-nasi'ah*, whether it is simple or compounded. This follows since commercial banking operations are primarily based on borrowing and lending, with the bank's income coming primarily from the difference between the (lower) interest rate it pays to depositors and the (higher) rate it charges its borrowers. In this regard, it is not valid to argue that banks are simply financial intermediaries that receive a commission for the

intermediation services. This argument is debunked since monetary authorities commonly prevent commercial banks from engaging in direct investment. Moreover, the depositors do not share in the banks' profits and losses, and the banks do not share in the profits and losses of their borrowers. Instead, the return on lent sums in both cases is fixed and predetermined as a rate of interest. Thus, we can see that the harmful effects of *ribā* are effected through banking interest, and thus is equally forbidden and *harām*, based on the verse: "But if you repent, then you shall have your principal" [2:279]. Indeed, the modern usage of the term *ribā* is restricted to returns based on the deferment of payment of debts, which makes it analogous to the pre-Islamic *ribā* that multiplies with the passage of time.

Thus, it is indeed the type of *ribā al-nasī'ah* effected through loans and currency exchanges that is most common in today's economies. Common examples include exchanging one currency for another without mutual receipt, and borrowing a sum of money with a condition to repay more than the lent sum. As for *ribā al-fadl*, it is rarely effected, but it is nonetheless forbidden to prevent means of circumventing the law (*saddan lil-dharā'ī*).

Thus, we base the prohibition of banking interest on the Qur'an, the Sunnah, and the consensus of the early Muslim community ('*ijmā'*). In this regard, it is true that the statement: "Every loan that results in a benefit is *ribā*" is not a *Hadīth*. However, it has been established that a number of the companions of the Prophet (pbuh) prohibited such loans, based on the *Hadīth* that states that the Prophet (pbuh) "forbade a loan and a sale [in one contract]". This *Hadīth* applies directly to the case of a person lending another a sum of money with a condition that he sells him his house, or a condition that he returns more than he borrowed. In all such cases, the increase is forbidden as long as it is stipulated as a condition or conventionally implied in the loan contract. However, if it was neither stipulated as a condition nor was it conventionally expected, then such increase is permitted. Thus, Al-Karkhī and other commentators interpret "every loan that results in a benefit is *ribā*" to refer to loan contracts in which an increase or benefit is stipulated as a condition or conventionally expected.

In addition, depositing monies in banks, and contracting for taxes to be paid from those monies, or contracting that the interest is collected and given to the poor, are also forbidden activities. This follows since Allāh does not accept any impure money (as a charitable contribution). 'Imām 'Ahmad in his *Musnād* narrated on the authority of 'Ibn Mas'ūd (mAbpwh) that the Prophet (pbuh) said: "Whenever a man earns money through forbidden means, then the spending of this money will not be blessed, charitable payments out of it will not be accepted, and whatever he leaves behind becomes his unholy sustenance in the hellfire. Indeed, Allāh does not cleanse impurity with impurity, but he cleanses impurity with the pure. The impure can never be cleansed through impurity." However, if the monies were deposited in foreign banks, and they earn interest, then – as we have seen in the *fatwā* of Al-'Azhar's *Fatwā Committee* in the sixties, published in *Al-Wa'y Al-'Islāmī* – the interest may be collected and spent on public goods and infrastructure. In this case, taking the money is better than leaving it to the non-Muslims to use in a manner that can potentially

harm Islam, and the lesser of the two evils is taken.

10.8.4 Legal treatments of banking interest in Arab Countries

While the various Arab country laws differ over verbal permission or prohibition of interest, they all in effect accept the conventional interest-based banking system. Some countries' laws permit interest unconditionally, e.g. the contract laws of Tunisia and Lebanon, which stipulate the charging of interest from the time of non-payment of the principal, with no upper-bound on interest rates. Recently, the Turkish prime minister followed this same trend by "liberalizing" the rates of interest. The Egyptian and Syrian civil laws permit interest under some conditions, which include: (i) interest payments may not exceed the principal, (ii) interest rates may not exceed a certain level, and (iii) interest is only accrued from the time of litigation. The Egyptian law (item #226) and Iraqi law (item #171) listed a maximal interest rate of 4% for civil transactions, and 5% for commercial transactions. The Moroccan law (m.870) stipulated that contracts containing interest conditions among Muslims are invalid. Similarly, Algerian law (item #s 455,457; 1975) stipulated that loans among individuals must always be interest free, and are invalid otherwise. However, the latter law permitted banks to pay interest to depositors. The same conditions were stipulated in Libyan law (item #74/1; 1972) that permitted interest payments by legal entities such as banks and the state, while forbidding them for private individuals.

This latter distinction has no basis in Islamic law, which does not distinguish in the prohibition of *ribā* between private individuals and the state. In this regard, the prohibition addressed all such entities equally. If that were not the case, the state would be exempted from many of the other prohibitions directed at private individuals (e.g. injustice, murder without right, and theft). In this regard, 'Abū Yūsuf told Hārūn Al-Rashīd in his book *Al-Kharāj*: "The ruler is not permitted to take any property from any individual without a well known and legally established right".

The Jordanian law (based on the system of *murābāha* under Ottoman law, March 1903) listed a maximal interest rate of 9%. Moreover, Jordanian civil law stipulated that any condition that brings benefit in a loan contract is invalidated, while the contract itself remains valid. This is also the legal approach followed in the United Arab Emirates, where the civil law of 'Abū Dhābiy equated civil and commercial transactions. The UAE supreme court (item #14, 1979) ruled that the two items 61 and 62 of this law were constitutional, and added that the interest rate stipulated by the court may not exceed the rate agreed upon or used by the parties prior to litigation. The UAE law (item #714) ruled that a condition that results in a benefit in a loan contract is invalid, while the contract remains valid. On the other hand, the penal code of the UAE (item #409) dictates that: "Any private party who deals with another private party with *ribā al-nasi'ah* in any civil or commercial contract, is to be punished by incarceration for a period of at least three months, and a fine of no less than

2000 *Dirhams*. This ruling applies to any condition that constitutes an explicit or implicit *ribawi* interest payment". This ruling implicitly exempts banks and other legal entities from this punishment.

Finally, the two civil laws of Sudan (item #s 279/1,281) and Kuwait (item #547/1) each prohibit explicit *ribā* or interest: "All loans must be interest free, and any condition that violates this ruling is deemed invalid". However, the commercial law of Kuwait (item #102) stipulates that "the creditor has the right to collect interest in a commercial loan". This latter ruling is also consistent with the financial conduct in Sudan, Saudi Arabia, and other countries.

10.8.5 Arguments of those who permit banking interest

1. Some of those who wish to permit conventional banking interest rely on the argument that their interest payments are not "doubled and multiplied", but constitutes a low percentage of 4% or 9%. Thus, they argue that such low interest rates were not familiar to the Arabs before Islām, and are not covered in the verse "and he forbade *ribā*". We answer this claim by noting that the forbidden *ribā* is not only the *ribā al-jāhiliyyah* (doubled and multiplied) mentioned in *surat 'Āl 'Imrān* alone, but includes all the types of *ribā* mentioned elsewhere in the Qur'an and *Hadith*. In this regard, all *ribā al-fadl* and *ribā al-nasi'ah*, including any increase, small or large, are forbidden in loans and sales. This is clear in the verse "But if you repent, then you shall have your principals" [2:279], which is immediately reinforced by His (swt) saying "without inflicting or receiving injustice" [2:279]. Moreover, the "al" in "and he forbade 'al-*ribā*" [2:275] refers to the entire genus of *ribā*, which was further explained in the Sunnah of the Prophet (pbuh), with respect to the types of good eligible for *ribā*, and the contracts that it affects (sales, loans, and currency exchange). However, jurists disagreed over the criteria for *ribā*, where the Ḥanafīs and Ḥanbalīs make eligibility for *ribā* generally applicable to all goods measured by volume or weight. On the other hand, the Mālikīs restricted the criteria of eligibility for *ribā* to storable foodstuffs and monetary numeraires, and the Shāfi'iis restricted to it all foodstuffs and monetary numeraires.

In this regard, it is important to reiterate that the reason for the prohibition of *ribā* is not the potential for exploitation and injustice per se. In fact, that potential is one of the explanations of the wisdom of the prohibition, but it is not attached to the legal restriction, and may not be used for reasoning by analogy since it cannot be objectively measured. Thus, the argument that productive loans cannot be faulted for causing exploitation, and thus are not eligible for *ribā*, is an invalid argument. Moreover, we should keep in mind that banks use compounded interest, which certainly does belong in the category of "doubled and multiplied" *ribā* or increase. In this regard, we should also note that the claim made by Al-Sanhūrī that 'Ibn 'Abbās only forbade *ribā al-jāhiliyyah* to the exclusion of *ribā al-fadl* and *ribā al-nasi'ah* is simply wrong.

2. Others have argued that the term *ribā* is general in the law, some of its connotations being known to Arabs and others unknown. They base this opinion on the statement of ^cUmar (mAbpwh) “the verses of *ribā* are among the very last revealed verses, and the Prophet (pbuh) died before he fully explained it to us; thus avoid *ribā* and things suspiciously similar to it”. Their argument is flawed, since Islamic law is explained by the Qur’ān and the valid Sunnah. In this regard, the Qur’ān forbade the genus of *ribā*, and the *Hadīth* explained the meaning of “and forbade *ribā*”. This is further reinforced by ^cUmar’s urging to abandon *ribā* categorically, including things that are suspiciously similar to it. Moreover, we have seen that reasonably late in the Prophet’s life, after the conquest of Khaybar, he identified trading one volume of dates for two volumes to be precisely the forbidden *ribā*. This indicates that such transactions were familiar to the Arabs, who considered it a sale, but the Prophet (pbuh) explained to them that it was a form of the forbidden *ribā* rather than the permitted trade. Thus, the statement of Rashīd Ridā and others that only the doubled and multiplied interest (*ribā al-jāhiliyyah*) is clearly forbidden, and that the other types of *ribā* are debatable, is off the mark, since the term *ribā* used in the Qur’ān clearly includes all of its types.
3. Some contemporary writers, including Dr. Ma^crūf Al-Dawālībī, argued that the forbidden *ribā* is only that which affects consumer loans extended to needy and poor individuals who have to repay it doubled and multiplied. Thus, they try to argue that productive loans to the rich, and that result in significant profits, is not included under the banner of forbidden *ribā* since it does not include any form of exploitation of the needy poor. We note that this view was first articulated by speakers who were influenced by capitalist and Jewish ideologies in 1951, at the Islamic Jurisprudence Week held in Paris. I have already replied to this claim by noting that the legal prohibition is attached by objective legal measures, and not by the perceived wisdom in the prohibition, which can only be assessed subjectively in each case. In this regard, we reiterate that Islamic law categorically forbade the genus of *ribā*, without making any distinction between consumer and productive loans. Further proof is evident from the fact that the first forbidden *ribā* (as stated in the *Hadīth*) was that of Al-^cAbbās who was reasonably wealthy.
4. Some have argued that interest in productive loans provides an important social benefit that makes it permissible even if it causes other harms. This logic is based on an article in *Al-^cArabī* where a legal scholar argued that benefits that override harms should have precedence in legal rulings. In this context, the presumed benefit is the mobilization of savings to finance investment, growth, and employment creation, which is beneficial to the lender and borrower, as well as the society at large. This is balanced in their opinion against the only harm that is *ribā*.

This logic is clearly erroneous, since the correct general juristic principle

ple is “avoidance of harm takes precedence over the pursuit of benefits”. Moreover, the pursuit of benefits is only allowed as long as it does not contradict a legal text, thus restricted only to the cases where no clear legal ruling exists based on a direct text, a consensus among jurists, or a valid reasoning by analogy. Moreover, the harms of productive loans are more significant than the imagined benefits that are claimed to be exclusively achievable thus. In this regard, we may argue that the interest component of production costs may produce bad distortionary effects, and may even force an inflationary spiral that harms all economic agents in the long run. Moreover, an interest-based system gives the owners of capital a disproportionately large say in the direction of the economy, since they will be more bent towards lending other rich investors to the exclusion of the new entrepreneurial talents, thus reinforcing the unequal distribution of wealth.

5. Some have argued that conventional banks are an absolute economic necessity in the current age. This is a short sighted view, since there have been other economic systems that did not rely so crucially on the banking sector. Moreover, the remarkable success of Islamic financial institutions in recent years is proof that an economy can function without reliance on interest-based financing. We must also note that it is not acceptable to argue that banking interest have become customarily accepted among people, and thus may be tolerated. Even if we accept that this has become a custom in Islamic countries, it is a defective custom that contradicts legal texts and must be stopped.
6. Rationalizing *ribā*, by arguing that interest payments are intended to compensate the lender for the loss of purchasing power of his money due to inflation, is not acceptable. In fact, interest is primarily a compensation for the time value of the usage of the lent money, and not a compensation for the loss of its purchasing power. In fact, markets may run into circumstances where interest rates become a driving force for inflation, rather than the other way around.
7. Some have displayed extremely low levels of knowledge and thought by arguing that fiat paper monies are not measured by weight, and thus are not eligible for *ribā*. Some have thus argued that such monies should be treated the same as non-ribawī goods, including the classical example of copper coins, which may be treated in different quantities. This statement displays clear ignorance of the nature of monies, which are conventional monetary numeraires for the specification of prices. In this regard, they may be made of metals or any other materials. In this regard, the classical treatment of copper coins as goods rather than monies was based on the fact that they were insignificant (thus trading one copper coin for two was treated the same as trading one apple for two). Thus, this classical permission was not meant to restrict monies to gold and silver, but to facilitate trading in trivial amounts of various goods.

8. It may be said that the interest payments banks give to depositors constitute a permissible return on investment in various projects. However, the bank interest is predetermined and fixed, which severs its links to the actual profits or losses incurred in any given pool of investments.

Thus, we reject the previously mentioned wrong opinions published in *Al-^cArabi* regarding the permissibility of the “profits” of “deposit funds” and “investment certificates” endorsed by various countries in the name of encouraging savings and investment. The investment certificates that offer “gifts” after a specific period are also forbidden, since they are in fact a loan that results in a benefit to the lender. The argument that such instruments may be classified legally as *“āriyyah* (simple loan of the usage of the goods with no compensation) is not accepted, since the principal is guaranteed, and a *“āriyyah* in monies is legally equivalent to a loan (thus forbidding the increase). Moreover, the monies may not be considered a “deposit”, with a voluntary gift given by the borrower, since deposited goods may not be used for investment purposes, otherwise the borrower must guarantee its safety.

Also, investment in those instruments may not be considered silent partnership (*mudāraba*), since the profit ratio is fixed, making the contract a form of *ribā al-nasi’ah*. In this regard, the active partner in a *mudāraba* only guarantees the principle in cases of negligence or shirking, while the banks guarantee the principal in all cases. Moreover, in *mudāraba*, the financier incurs all financial losses of the investment and shares in the profits, which is a very different situation from the guaranteed principal and “profits” or “gifts”. In this regard, jurists ruled that a fixed profit amount may not be specified in any investment contract, based on *gharar*, where the profit may and may not exist. Further proof is provided in the *Hadīth* on the authority of Rāfi^c ibn Khudayj that the Prophet (pbuh) forbade renting land in exchange for water on the mills, and ordered that a known rent be paid in gold or silver. In this regard, we do not accept statements that an investment pool can have an be almost certainly profitable, thus resulting in minor *gharar*. In this regard, we are considering the amount of *gharar*, which is significant, and not the chances of loss being small or large. In this regard, when a bank incurs a loss (however unlikely that may be initially), such losses are often quite substantial.

While discussing the issue of *gharar*, we note that the same article in *Al-^cArabi* debunked here argued for the permissibility of life insurance. This is also a wrong opinion based on the wrong reasoning that the probabilistic calculations of the insurance companies render the amount of *gharar* minimal. In this regard, the probability of any particular accident is unchanged by the insurance company, and the potential for loss is just as substantial.

In summary, we say that banking interest is the forbidden *ribā* prohibited in the Qur'an, the Sunnah, and the consensus of the companions of the Prophet

(pbuh) and later Muslim nation. The arguments for its permissibility have been shown to contradict those clear legal proofs, and often to show ignorance of the actual conduct of conventional banks. In this regard, we should also note that the past Mufti of Egypt Dr. Sayyid Tanṭawī have contradicted themselves, since he had previously ruled for the prohibition of banking and investment certificate interest.⁸¹

10.8.6 Rules for dealing with Islamic financial institutions

Islamic financial institutions function by collecting funds and investing them on behalf of their participants. Their goals are rebuilding the Islamic society and the realization of Islamic cooperation while adhering to the fundamental Islamic laws. Those fundamental laws dictate the avoidance of dealing in *ribā* and other forbidden contracts, as well as distribution of profits according to agreed-upon and fair ratios without doing injustice. They also aim to help assist the needy through interest-free loans, as well as supporting the socio-economic foundations of an Islamic society.

10.8.7 What distinguishes Islamic financial institutions?

It is imperative upon Islamic financial institutions to highlight the differences between them and the conventional banks that rely on interest-based borrowing and lending. They also need to show that they can adhere to Islamic legal rules while competing successfully with the conventional banks and providing the financial services that Muslims need to satisfy their financial and economic needs. The success of the Islamic financial institutions is imperative to allow Muslims to escape the arrogance of capitalist markets that reinforce unequal income distributions through their interest-based banking sector.

The main features that distinguish Islamic financial institutions from their conventional banking counterparts are:

1. Those institutions adhere closely to the Islamic creed (*aqidah*). Since those institutions are first and foremost Muslim institutions, they share the fundamental Islamic drive to avoid what Allāh has forbidden. In this regard, the Qur’ān contains clear and eternal prohibitions of all kinds of *ribā*, including the banking *ribā al-nasi’ah* as well as *ribā al-fadl*. All those types of *ribā* are forbidden in sales as well as loans, be they consumption or production oriented.

In this regard, Allāh (swt) says: “But indeed Allāh has permitted trade and forbidden *ribā*” [2:275], which covers the entire genus of *ribā* of all kinds. He (swt) has also warned that the *ribā* interest and its benefits are wiped out: “Allāh will deprive *ribā* of all blessings, but will give increase for deeds of charity” [2:272]. He (swt) also ordered the Muslims to abandon

⁸¹See Dr. Al-Sālūs’s books *’Ajra’ukum cAlā Al-Fatwā ’Ajra’ukum cAlā Al-Nār*, and *Hukm Wadā’Ic Al-Bunūk wa Shadādāt Al-’Istithmār fī Al-Fiqh Al-’Islāmi*, where he clearly makes the case for the prohibition of those types of interest.

and liquidate all remaining *ribā* (regardless of how large or small): “O you who believe, fear Allāh and give up what remains of *ribā*, if you are indeed believers” [2:278], and declared war on those who devour it: “If you do not, take notice of a war from Allāh and his Messenger; but if you turn back then you shall have your principals without inflicting or receiving injustice” [2:279]. Indeed, the punishment mentioned in this last verse is the severest in all of Islām, providing further proof that *ribā* is one of the most severely forbidden of transgressions to deserve such a declaration of war from Allāh (swt) and his Messenger (pbuh).

In addition to the avoidance of *ribā*, Islamic financial institutions refrain from producing, financing, manufacturing, or trading in forbidden commodities such as wine. They also avoid monopolistic practices, as well as deception and unfair practices. This is in contrast to conventional banks that survive on the payment and receipt of interest and endorsement of monopolistic practices to the full extent of the man-made laws. In this regard, the Islamic financial institution also avoids excesses of all kinds, and attempts to target its financing and economic activities towards the good of the Muslims and the nation.

2. Islamic financial institutions endorse the principles of mercy and forgiveness when clients face financial difficulties. This is based on Allāh’s (swt) command: “If the debtor is in a difficulty, grant him time till it is easy for him to repay. But if you remit it by way of charity, that is best for you if you only knew” [2:280]. This is clearly in contrast with conventional banks, who in their blind pursuit for profits will be quick to repossess the properties of the debtors that were presented as collateral for their debt.
3. The primary goal of Islamic financial institutions is not profit-making, but the endorsement of social goals of socio-economic development and the alleviation of poverty. In this regard, such institutions provide interest-free loans to the needy families, serve in the distribution of *zakāh* to the poor and for education and religious centers. In this regard, the Islamic financial institutions attempt to link the economic and social development goals in a harmonized overall framework based on Islamic teachings. They avoid excessively speculative or untruthful transactions, which can have an adverse economic and social effect on the nation.
4. Islamic financial institutions provide more transparency in their dealings, since the depositors’ monies are invested in specific projects that are known to all. This is in contrast to the conventional banks, whose goals are simply to charge a higher interest rate than the one it pays, without necessarily giving sufficient information about his dealings. Thus, the depositors share in the capital of the Islamic financial institution as well as in its management, with profits and losses shared among the investors according to agreed-upon ratios.

In most cases, the Islamic financial institutions will invest as silent partners with entrepreneurs who provide their labor and expertise in investing the

financial institution's money. In this case, the financial institution bears all financial losses (not caused by negligence or transgression), and shares any profits with the entrepreneur according to an agreed-upon ratio.

In trading arrangements, Islamic financial institutions use the *murabaha* (cost-plus) contract. This is a type of trust sales (*buyūc al-'amānah*), thus allowing the buyer to void the sale if he discovers that the seller betrayed him. In this case, the majority of jurists agree that the Islamic financial institution can thus collect a reasonable profit rate for funding such sales, whether the price is paid on the spot, with deferment, or in installments, as long as the overall price is agreed-upon at the time of sale. This cost-plus formula may also be used for building a house or a similar transaction, where it is permissible for the price to increase with the term of deferment of the price payment.

Such institutions also deal in currency transfers in a manner very similar to conventional banks, with or without a commission. As for letters of credit (*khItābāt al-damān*) that allow a client to deal with a third party, they are permissible forms of guarantee (*kafālah*). In this regard, the bank may collect a fee for this guarantee if it is partially or totally covered by a deposit. This follows since the contract is in fact jointly a guarantee to the third party and a legal agency or representation (*wakālah*) between the financial institution and its client. However, if the letter of credit is uncovered, then the institution may not collect a fee since such a fee is not permissible for a pure guarantee (*kafālah*), which is a charitable contract. This is the opinion articulated by the First Conference on Islamic Banks, as well as the Shari'a Board of Faisal Islamic Bank in Sudan. The latter board allowed the charging of a fee for uncovered guarantee provided that the fee covers the effective costs of issuing the letter.

5. Depositors in Islamic financial institutions derive profits from the actions of the institution and its legal agents. Thus, the capital provider is a partner in the bank either through a silent partnership (*mudarabah*) or a general partnership (*sharikat 'inān*). In this regard, the multiplicity of capital providers and of active partners is permissible in both types of partnerships. In all such cases, the principals are not guaranteed, and the profits and losses are shared according to the ratios specified in the contract. Most Islamic financial institutions apply unconstrained silent partnership as a recipient of investment funds from depositors, and constrained silent partnership (*mudārabah muqayyadah*) for their own investments.

In all dealings involving debts, Islamic financial institutions do not deal in interest. Therefore, all loans they extend are interest free, and may not involve any other type of benefit to the lender. Also, Islamic financial firms are not allowed to receive interest for pre-payment of deferred liability, since that would constitute forbidden *ribā* under the rule of "prepay and reduce the liability".

Thus, Islamic financial institutions are not allowed to collect or pay in-

terest when dealing with foreign banks. A compromise has been reached between some Islamic and non-Islamic banks, whereby the Islamic bank does not collect interest on its deposits, and the other bank does not charge interest for overdrafts. In contrast, conventional banks always charge and receive interest on credits and liabilities, and this could lead to inflationary pressures. Moreover, the institution of charging compounded interest can quickly result in insolvency of debtors, which can have catastrophic effects on the debtor and the economy at large.

6. Islamic financial institutions aim to provide their services to all economic groups, while conventional banks are not accessible to the poorer classes. This provides for greater social harmony due to the upward mobility of those who lack resources, and can be invigorating for the economy by giving opportunities to the young and energetic entrepreneurial classes.
7. Islamic financial institutions try their best to assess their commissions and fees in line with the actual costs of the services they provide. In this regard, the Dubai Islamic bank does not even collect a fee for its interest-free loans.

10.8.8 Is dealing with Islamic financial institutions permitted?

As we have seen, Islamic financial institutions abide by the permissible transactions in Islām and avoid the forbidden transactions. Moreover, they serve a vital economic needs of the poor in the economy, while providing a valuable service in mobilizing savings and encouraging investment and growth in the economy.

It is well known that the original status of all economic contracts is permissibility unless ruled otherwise. Thus, since the transactions of Islamic financial institutions are far from the forbidden *ribā*, and they provide useful economic tools to meet the economic needs of Muslims, they are permissible. In this regard, Islām does not forbid anyone from making reasonable profits (up to 20% or 33%). While some people doubt that certain types of profits made from Islamic banks may seem similar to *ribā*, we note that as long as the means used to obtain those profits are permissible, the transactions are permissible. Thus, while some may argue that the increase in price for deferment (say in installment payments of an item purchased through *murabaha*), we say that the Muslim jurists permitted such transactions to meet the economic needs of Muslims. Such contracts are not exploitative, on the contrary, they help the consumer to obtain goods that he would not otherwise be able to consume.

Similarly, commissions and fees that Islamic financial institutions charge for their services may be thought by some to be forbidden *ribā*. However, most of the activities of those institutions take the form of rental (e.g. of a deposit box or storage room) and hiring of labor services (e.g. in maintaining such space, or preparing paperwork for transactions), or agency in exchange for a fee. All such fees and commissions are permissible and should not be confused for the forbidden *ribā*.

Chapter 11

Trust Sales (*murābāha*, *tawliya*, *wadīcā*)

We have seen previously that sales as exchanges can be classified into five categories:

1. Sale at negotiated prices (*bayū al-musāwama*): This type of sale is concluded at the agreed upon price without reference to the original price of the commodity. This is the most common type of sale.
2. Cost-plus sale (*bayū al-murābāha*): In this sale, the object is sold at the price at which it was obtained plus a stated profit margin. The Malikīs define this contract thus: the seller informs the buyer of the cost at which he obtained the object of sale, and collects a profit margin either as a lump-sum (e.g. “I bought this for 10, and you pay me 2 as profit”), or he may state the profit margin as a percentage or ratio (“and you pay me 20% profit”).¹ The Hanafis define it thus: it is the transfer of the object he obtained through a prior contract in exchange for the original price plus a profit margin. The Shāfi‘īs and Ḥanbalīs define it thus: it is selling at the principal plus a profit margin, provided that both parties know the principal (cost of obtaining the object of sale).²
3. At-price sale (*bayū al-tawliya*): In this sale, the object is resold to the buyer for the same price at which the seller obtained it; thus its name suggests that the seller lets the buyer takes his place (*yatawallā*) in the original sale.
4. At-price partial sale (*bayū al-’ishrāk*): this is the same as at-price sale, except that only part of the obtained object of sale is resold to the buyer.

¹Ibn Juzayy ((Mālikī), p.263).

²Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.77), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.382), ’Ibn Qudāmah (, vol.4, p.199).

5. Sale at a loss (*bayū al-wadića*): In this sale, the object is sold with a known discount below the price at which it was obtained.³

11.1 Cost-plus sales (*murābaha*)

Cost-plus sale is a legally permissible contract by the testimony of the majority of jurists and companions of the Prophet (pbuh). However, the Mālikīs find it less desirable. The proof of its permissibility is derived from the following:

1. There are many verses in the Qur'an that explicitly permit sales in general, e.g. "And Allāh has permitted trade" [2:275], "But let there be among you traffic and trade by mutual good will" [4:29]. In this regard, cost-plus sales are clearly concluded by mutual consent.
2. A valid narration reports that the Prophet (pbuh) while planning for emigration to Madīnah, learned that 'Abū Bakr had purchased two camels. He asked him to sell him one at the price at which he obtained it "*wallinī 'ahadahumā*". 'Abū Bakr said: "It is yours at no price", but the Prophet (pbuh) replied: "Not without a price".⁴
3. It was narrated that 'Ibn Mas'ūd (mAbpwh) ruled that there was no harm in declared lump-sum or percentage profit margins.
4. This type of sale satisfies all the legal requirements for sale, and it provides a valuable service in economic markets since it allows those knowledgeable of market conditions to make a profit and those without such knowledge to obtain the goods at a good price.

In this regard, the price in *murābaha* is determined, and thus permitted. In what follows, we discuss *murābaha* in four subsections:

1. Conditions of *murābaha*.
2. The initial price (principal), and what may or may not be appended to it.
3. What needs to be disclosed in a *murābaha*.
4. The legal status of the sale if a breach of trust is discovered.

We note that the issues discussed in those four subsections pertain not only to *murābaha*, but also to *tawliya*, *'ishrāk* and *wađīća*.

³Khusrū (1304H (Hanafī), vol.2, p.180).

⁴Narrated by Al-Bukhāri on the authority of *‘Ā’ishah* (mAbpwh), and also by 'Imām 'Ahmad in his *Musnad*, 'Ibn Sa'd in *Al-Tabaqāt*, and 'Ibn 'Ishāq in *Al-Sīrah*.

11.1.1 Conditions of *murābāha*

The conditions of *murābāha* are as follows:⁵

1. Knowledge of the initial price: The second buyer must know the price at which the seller obtained the object of sale, since knowledge of the price is a fundamental condition for the validity of sale. This condition applies to other trust sales discussed in this section, since they all depend crucially on the original price. In this regard, the sale is considered defective if the initial price is not known during the contract session. Thus, if the two parties were to part without the buyer's knowledge of the initial price, the sale would be invalidated due to the establishment of that defectiveness.
2. Knowledge of the profit margin: Since the profit margin is a component of the price at which the second buyer obtains the goods, knowledge of that margin is essential for knowledge of the price, which is in turn a condition of validity for the sale.
3. That the original price be fungible: Thus, the price at which the seller obtained the goods must be measured by weight, volume, or number of homogeneous goods. This is a condition for *murābāha* and *tawliya*, regardless of whether the trade is concluded with the initial seller or another party, and regardless of whether the profit margin is specified in goods of the same genus as the original price. Thus, if the original price were not fungible, the object may not be sold through *murābāha* or *tawliya* by anyone other than the owner. This follows since the price in the second sale must be equal in *tawliya* and with a profit margin in *murābāha*.

In this regard, if the original price was non-fungible (e.g. a house, clothes, etc.), then we consider whether the seller is the owner or not:

- If the seller is not the owner, the *murābāha* or *tawliya* is not permitted, since the object itself is not in the seller's property, and its value is unknown.
- If the seller is the owner, we consider two cases:
 - (a) If the profit margin is specified as a known amount of a different good (e.g. silver coins, a specific dress, etc.), then the sale is permitted. In this case, the first price is known and the profit is known (e.g. I sell you via *murābāha* in exchange for the dress in your hand, and a profit of 10 silver coins).
 - (b) If the profit is made part of the initial price (e.g. the profit margin is 10%), then the sale is not permitted, since the profit is made part of the object, which is not equally divisible. In this regard, what is equally divisible is its value (determined in money terms), but that value is not exactly known and estimates may vary.⁶

⁵Al-Kāsānī ((Hanafi), vol.5, pp.220-222).

⁶Ibn Al-Humām ((Hanafi), vol.5, p.254), Al-Sarakhsī (1st edition (Hanafi), vol.13, p.91).

In the case of discount sales (*wadi^ca*), the ruling is the opposite of that for *murābaha*. Thus, if the discount is specified in goods other than the initial price (e.g. coins), the sale is not permitted. In this case, the deduction needs to be made from the original price that is not known. On the other hand, if the deduction is made of the same genus as the initial price (e.g. at a 10% discount), the sale is valid since the deducted part is distributed equally over a known price.⁷

4. When trading in goods eligible for *ribā*, the validity of *murābaha* requires that *ribā* is not effected in relation to the original price. For instance, if an object measured by weight or volume is initially traded for goods of the same genus in the same amount, then the purchased goods may not be sold via *murābaha*. In this case, the *murābaha* would consist of trading at the initial price plus an increase. In goods eligible for *ribā*, the increase is *ribā* rather than profit. Similarly, such goods may not be sold via *wadi^ca*. However, they may be sold for the same amount via *tawliya* or *'ishrāk*, where *ribā* is not effected.

However, if the genera in the initial sale were different, then *murābaha* is permitted. For instance, if the seller originally bought a gold coin for 10 silver coins, then he may sell it via *murābaha* with a profit as one silver coin or a specific dress, etc.⁸

5. The initial contract must be valid. Thus, if the object of sale were obtained by means of a defective sale, the ensuing *murābaha* is not permitted. In this regard, *murābaha* is a sale at the initial price plus a profit margin. However, a defective sale establishes ownership in exchange for the value of the object of sale or its equivalent, and not in exchange for its price. Thus, the naming of the price in the *murābaha* is not valid if the initial sale were defective.

11.1.2 Initial price, and what may be appended to it

We refer to the initial price for goods later sold in *murābaha* or *tawliya* as “the principal”, which is the amount the initial buyer owed the original seller. The initial buyer may in fact pay the initial seller other goods as a substitute for this price that was named in the original sale. Thus, if the initial buyer bought a dress for 10 silver coins, and then made the payment by one gold coin (in lieu of the named price), the principal remains the 10 silver coins named as the original price. Similarly, the initial price may have been named as 10 good silver coins, but what was paid were coins mixed with copper, and they may have been accepted by the initial seller. If the same goods were not to be sold in a *murābaha*, the relevant principal are 10 good silver coins, and not what was accepted as a substitute for that named price.

⁷Al-Kāsānī ((Hanafi), vol.5, p.221).

⁸Al-Sarakhsī (1st edition (Hanafi), vol.13, pp.82-89).

In this regard, consider the case where the initial price was named as 10 silver coins of a currency other than that of the country of the second (*murābaha*) sale, and the profit margin is named as 1 silver coin without specifying the currency's country. In this case, the price in *murābaha* would be 10 silver coins of the original currency, while the profit would by convention be determined to be of the local currency. However, if the profit is named as a percentage of the initial price, then it is paid in the same genus as that price.⁹

All normal costs associated with the object of sale in *murābaha*, which result in an increase in its amount or value, may be appended to the principal. This includes such costs as those incurred for dying, washing, sewing, intermediation in sales, feeding of animals, etc. Such costs are appended to the principal by convention, and as the tradition says: "Whatever the Muslims view as fair, it is fair in the eyes of Allāh". Those costs are appended to the principal in *murābaha* and *tawliya*. However, the buyer in this case does not list the principal with the appended costs as the price at which he acquired the goods, but rather lists the total sum as his cost for the goods.

However, a number of other incurred costs may not be appended to the principal, including the wages of a doctor, copper, shepherd, etc. In such cases, the *murābaha* or *tawliya* must name the initial price of the goods only. This applies to all costs that are not conventionally appended to the principal, following the principle: "Whatever the Muslims find as unfair, it is unfair in the eyes of Allāh".¹⁰

11.1.3 Disclosure in *murābaha*

Murābaha and *tawliya* are trust sales, names as such since the buyer trusts the seller to correctly reveal the initial price at which he acquired the goods without need of proof or oath. In this regard, it is very important to protect the buyer from betrayal of this trust, as Allāh (swt) said: "O you who believe, do not betray the trust of Allāh and his Messenger, nor misappropriate knowingly things entrusted to you" [8:27]. In this regard, we also recall the *Hadīth*: "Whoever cheats us is not one of us".¹¹

Thus, if a defect were to ensue in the object of sale while it is in the possession of the seller or buyer, and if the seller wishes to sell it via *murābaha*, we need to consider the following cases:

- If the defect was caused by natural causes, the seller may sell it via *murābaha* for the entire price without disclosing the defect. This is the opinion of the majority of Ḥanafīs, since they ruled that there is no part of the price corresponding to the defect. In this case, it is as if the seller had paid the initial price in exchange for the goods in their current status,

⁹ Al-Ķāsānī ((Hanafi), vol.5).

¹⁰ Ibn Al-Humām ((Hanafi), vol.5, p.255), Al-Ķāsānī ((Hanafi), vol.5, p.223), 'Ibn āAbidīn ((Hanafi), vol.4, p.161).

¹¹ We have previously listed the chains of narration of this *Hadīth*, c.f. Al-Haythamī (, vol.4, p.78).

and disclosure of the defect or lack thereof make no difference.¹²

However, Zufar and the majority of other jurists ruled that a defective item may not be sold via *murābaha* unless the defect is disclosed to the buyer, to avoid suspicion of betrayal of trust. This follows since the defect may affect the utility of the goods to various potential buyers, and is considered a diminution of the object.¹³

- If the defect ensues due to actions of the first buyer or a third party, then all jurists agree that *murābaha* requires disclosure of the defect.
- If an increase ensues in the object of sale (e.g. giving birth, bearing fruit, growing wool, creation of milk, etc.), then the object may only be sold via *murābaha* after disclosure of the increase. In this case, the Ḥanafīs ruled that the generated increase is sellable, and it does not reduce the price. Thus, the sale in this case requires disclosure of the increase without changing the price.¹⁴
- If the object of sale were land, and if the land was used for agriculture, it may be sold via *murābaha* without disclosure, since any increase that is not generated from the object itself is not subject to sale.
- If the object of sale was initially purchased with a deferred price, this must be disclosed to the buyer in a later *murābaha*. This follows since deferment normally results in an increase over the cash-and-carry price.
- If the object was purchased in exchange for a debt owed by the initial seller, the buyer may resell it via *murābaha* without disclosing this information to the second buyer. In this case, he bought the object in exchange for the amount of money for which the initial seller was liable, and this amount of money is the price, since a debt does not by itself define the price.
- If the object was accepted as a compensation for an unpaid loan, then it may not be resold in a *murābaha* with the price being the original loan. In this regard, the arbitration resulting in this compensation is built on the concept of forgiveness, and the second buyer must know whether or not the seller had indeed forgiven that initial debt. This is in contrast to the case where the object is obtained through a sale, since sales are built on the buyers' attempts to pay the lowest possible price.
- If an object is bought at a certain price below its value, and then it is listed in a catalogue at a higher price, then it may be sold in a *murābaha* at that catalogue price without mentioning the initial cost. However, he should not claim that the catalogue price is the price at which he obtained the object, since he would thus be lying. Also, this is only permissible if

¹² Al-Kāsānī ((Hanafi), vol.5, p.223).

¹³ Al-Dardīr ((Mālikī)A, vol.3, p.164), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.289), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.79), Ibn Qudāmah (, vol.4, p.182).

¹⁴ibid.

the buyer knows that the catalogue price need not be the same as the price at which the good was acquired. However, if the buyer was under that impression, then mentioning only the catalogue price in a *murābāha* would constitute a betrayal of his trust, and establish an option for him.

- Similarly, if a person inherits or receives goods as a gift, and sells them through *murābāha* at a fairly estimated value plus profit margin, the sale is valid since no deception is effected.¹⁵

11.1.4 Betrayal of trust

If the seller admits betrayal of trust in a *murābāha*, or if a proof is provided or he refuses to take an oath of not betraying the buyer's trust, then we must consider whether the betrayal pertains to the characteristics of the object of sale, or to its price:

- If the betrayal of trust pertains to the characteristics of the price: For instance, if the object was initially purchased with a deferred price and resold in a *murābāha* or *tawliya* without informing the buyer of this deferral, then the Ḥanafis agree that the buyer has an option. In this case, the buyer may keep the merchandise, and he may return them, since the *murābāha* or *tawliya* is based on trust. Once this condition is betrayed, the option is established for the betrayed party in analogy to the case of *khiyār al-ayb*. The same applies if the object of sale was obtained as compensation based on arbitration in lieu of an unpaid debt. In this case, also, the second buyer has an option to keep or return the merchandise.
- The betrayal may pertain to the amount of the price in a *murābāha* or *tawliya*. For instance, the seller may claim that he bought the goods for 10, while in fact he had purchased them for less. In this case, 'Abū Ḥanīfa (mAbpwh) ruled that the second buyer has an option in the case of *murābāha* whether to keep the goods in exchange for the full price, or to return it. In the case of *tawliya*, however, he ruled that the buyer has no such option, but he may deduct the amount of the deception, and the contract is binding at the true initial price. This is the opinion accepted by most Ḥanafis. The difference between *murābāha* and *tawliya* in this regard is that the actual profit in the sale is more than the buyer agreed to, which leads to a defect in the condition of mutual consent. However, the contract remains *murābāha*, only with a higher profit margin than the buyer agreed to. Thus, the buyer's option is established in this case in analogy to the case of betrayal pertaining to the characteristics of the price. However, in the case of *tawliya*, once the paid price is different from the initial price, it becomes a *murabaha* contract, which is fundamentally different from the original contract. Thus, establishing an option for the buyer in this case would be a mandatory change of the contract that was agreed to by the

¹⁵ Al-Kāsānī ((Hanafi), vol.5, p.224).

parties, which is not acceptable. Thus, the Hanafīs preferred to deduct the amount of the betrayal, keeping the *tawliya* contract binding at the correct initial price.

According to this opinion, in the case of *murābaha* with a betrayal of trust, the option would be dropped if the object is consumed, perishes, or develops a defect that prevents returning it. In this case, the buyer is still bound to pay the full price.

'Abū Yūsuf ruled that the buyer does not have an option in either case, and the price should be deducted by the appropriate amount in both *murābaha* and *tawliya*. Thus, the price and profit margin would be adjusted by replacing the wrongfully named initial price with the correct one. In this case, the contract is binding at the appropriate price calculated based on the initial price.

Muhammad, on the other hand, ruled that the buyer has an option in this case in both *murābaha* and *tawliya*. His proof is that the buyer only accepted the contract at the named price, and should not be bound by any other contract. He thus ruled that the buyer's option is established in analogy to *khiyār al-bay'*.¹⁶

We note that the approved opinion among the Hanafīs is that the object or price may be returned to its owner if there is major deception resulting in a significant difference in prices, whether the deception is effected by one of the trading parties or by a third party. In this regard, deviation of the price from its fair value is considered excessive if it falls outside the normal range of professional assessments (say 30%, which is substantial). However, if the difference is small, then it is considered minor *ghubn*, and no return is allowed. Moreover, no return is permitted if there was no purposive misinformation.¹⁷ This ruling is intended to facilitate transactions while protecting the rights of buyers and sellers.

In all of the above, '*ishrāk*' inherits the same rulings as *tawliya*, since it is a *tawliya* in part of the merchandise for a proportional part of the price. The proportions that determine a *sharikah* is discussed in major works of jurisprudence.¹⁸ As for *wadī^ca*, we have seen that it is a sale at the initial price with a known discount. This type of sale inherits the same conditions and rulings of *murābaha*.¹⁹

Murābaha to-order

Contemporary Islamic banks have extensively used a contract whereby they purchase a good upon the request of a client, and then re-sell that good to the

¹⁶ Al-Sarakhsī (1st edition (Hanafī), vol.13, p.86), Al-Kāsānī ((Hanafī), vol.5, pp.225 onwards), 'Ibn Al-Humām ((Hanafī), vol.5, p.256), 'Ibn 'Abidīn ((Hanafī), vol.4, p.163).

¹⁷ 'Ibn 'Abidīn ((Hanafī), vol.4, pp.166 onwards).

¹⁸ Al-Kāsānī ((Hanafī), vol.5, p.226).

¹⁹ [ibid., p.228].

client in a *murābaha*. This contract is viewed as an alternative to the lending practices of conventional banks, and it enables Muslims to finance purchases of major items such as cars, or business equipment.

The transaction may be decomposed into two promises: a promise by the client to purchase the object, and a promise by the bank to sell him the good in a *murābaha*. The price at which the bank re-sells the object to the client is usually deferred [or in installments] and greater than the cash price of the good.²⁰

This transaction is valid, as evidenced by the proof provided by 'Imām Al-Shāfi'ī in *Al-'Umm*: "If an individual shows another a good and says: buy this, and I will give you this much profit in it; and then the second man buys it, then the purchase is valid. If the first party said: 'I will give you this much profit in it, but I retain an option', then he may conclude the sale or leave it".²¹ Thus, we see from the argument of 'Imām Al-Shāfi'ī that the transaction is fundamentally valid provided that the bank receives the purchased items. As for making the promise to purchase the item once the bank acquires it binding on the ultimate buyer, we may take a ruling by 'Ibn Shabramah from the Mālikī school that any promise that does not result in permitting that which is forbidden or forbidding that which is permitted is binding. The Mālikīs use this principle to make promises binding, especially if the promise leads another entity to undertake a financial obligation. We note in this regard that this synthesis (*talfīq*) of two rulings from two different school of jurisprudence is not the forbidden type of *talfīq*, since the two rulings pertain to two very different issues. In this regard, there is no harm in following one 'Imām on one issue, and another 'Imām on the other.

The Mālikīs have also explicitly permitted this type of transaction. Thus, they say: "The following are reprehensible (*makrūh*): A man asks the other: 'do you have such and such to sell it to me with a deferred price?', the man says 'no', so the first man says: 'buy it, and I will buy it from you with a deferred price including a known profit margin', then the second man buys it according to their mutual promises".²²

Two conferences on Islamic banking have accepted this practice. In the first Conference in Dubai (1979), it was ruled that: "This type of promise is legally binding on both parties based on the Mālikī ruling, and religiously binding on both parties for all the other schools. In this regard, what is religiously binding can be made legally binding if this is beneficial and can be regulated legally".

The second Conference in Kuwait (1983) ruled thus: "The conference determines that the mutual promises involved in *murābaha* sales to the one who orders the initial purchase is permitted after the bank owns and gains possession of the sold object, and then sells it to the one who ordered its purchase with the promised profit margin. This sale is valid as long as the bank is exposed to the risk of destruction of the good prior to delivering it to the final buyer,

²⁰ *Bayān Al-Murābaha Lil-'Āmir Bi-l-Shirā* by Dr. Yūsuf Al-Qardāwī (p.36).

²¹ Al-Shāfi'ī (, vol.3, p.33).

²² Al-Hattāb (1st edition (Mālikī), vol.4, p.404), *Al-Bayān wa Al-Taḥṣil* by 'Ibn Rushd (vol.7, pp.86-89).

as well as the obligation to accept the return of the goods if a concealed defect were found. Moreover, the bank incurs all other financial responsibilities such as insurance. In this regard, the majority of jurists agree that the sale prior to receipt is not permitted, while the Mālikīs permitted the sale of foodstuffs prior to their receipt.

As for the making the promises binding on either party or both, such ruling is conducive to stability of the contractual obligations and protection of the parties' economic interests. Moreover, such a ruling that renders the promises binding is legally acceptable.

Finally, this transaction does not fall in the forbidden category of two sales in one. In this regard, 'Imam Al-Shāfi'i has shown that the prohibition applies when accepting one of two sales is unclear, unknown, or suspended. However, he has shown that if the buyer specifies which one of the two sales he accepts, the contract is valid. The other circumstance of two sales in one that is forbidden is the case where one sale includes a condition of another sale (e.g. I sell you my house on condition that you sell me your horse).

11.2 Revocation of Sale ('iqālah)

A valid and binding sale, which is void of options, may be voided by mutual consent of the buyer and seller. This process is called revocation or '*'iqālah*'. *'Iqālah* is commonly listed under sales since this is its most common application, however, it applies to the process of voiding all contracts except for marriage. Thus, we may define revocation legally as a contract by means of which a previous contract is voided.²³ We shall discuss the legality of this contract as well as its definition and cornerstone, followed by a discussion of its true nature and legal status, and finally a discussion of conditions of its validity.

11.2.1 Legality, definition, and the cornerstone

Revocation of sales is highly recommended in certain circumstances based on the *Hadīth* narrated by Al-Bayhaqī on the authority of 'Abū Hurayrah: "Whoever revokes the sale of someone who regrets a sale, Allāh will revoke his sins on the day of judgment". 'Abū Dāwūd narrated this *Hadīth* thus: "Whoever revokes [the troubles of] a Muslim, Allāh will revoke his sins".²⁴

Revocation ('iqālah) is the legal term used for voiding of the contract, even if only for part of the object of sale. For instance, a person may sell 100 pounds of wheat for \$50, and delivers them to the buyer, then the buyer and seller may part. The seller may then ask the buyer to either pay him the price or to return the wheat that was delivered to him. In this case, the buyer may return part or

²³See *Al-Madkhal Al-Fiqhī* by Professor Al-Zarqā' (p.290).

²⁴Also narrated by 'Ibn Mājah who added "on the day of judgment". Narrated as well by 'Ibn Hibbān in his *Šaḥīḥ* and Al-Hākim in *Al-Mustadrak*. The latter stated that it is a valid *Hadīth* following the methodology of Al-Bukhārī and Muslim, but they did not narrate it; c.f. Al-Ḥafiz Al-Zaylaqī (1st edition, (Hadīth), vol.4, p.30), 'Ibn Al-'Athīr Al-Jazarī (, vol.1, p.371), Al-Sanqānī (2nd printing, vol.3, p.33).

all of the wheat that was delivered, and this would constitute a voiding of the sale for the part that was returned.

The cornerstone of revocation is an offer from one of the two parties to the original contract, and the acceptance of the other party. The language of the contract must use the past tense in Arabic, thus one of the parties says: “I have revoked” (*'aqaltu*), and the other person says “I accepted” (*qabiltu*).

In Arabic usage, if one verb is imperative and the other is in the past tense, for example one says “*'aqelni*”, and the other says “*'aqaltuka*”, then 'Abū Ḥanīfa and 'Abū Yūsuf ruled that the revocation contract is concluded (as in the case of the marriage contract), since there is usually no bargaining in revocation (in contrast to sales). Thus, the acceptance verb is enough. However, Muḥammad ruled that both verbs must be in the past tense, in analogy to the sale contract.

The verb “to revoke” (*'iqālah*), does not need to be used. Similar verbs such as “I voided the sale”, “I cancel the sale”, etc. may also be used. Also, revocation may be concluded by hand-to-hand exchange, as in the case of sale.²⁵

11.2.2 Revocation and its legal status

The Mālikīs and Zāhirīs considered revocation a second sale, since the object of sale returns to the seller through the same venue he gave it away. Thus, it is concluded by mutual consent, with everything permissible for sales being permissible for revocation and vice versa.²⁶

The Shāfi'īs and Ḥanbalīs, on the other hand, ruled that revocation is a voiding of the contract. In this regard, they find the return of the object of sale was effected by means of a verb that does not conclude a sale. Thus, it is considered a voiding of the contract, in analogy to returning defective merchandise.²⁷

The Ḥanafīs had multiple opinions:

- The most accepted opinion is that of 'Abū Ḥanīfa who ruled that revocation is a voiding for the two contracting parties, and a third contract for a third party. This is his opinion regardless of whether the revocation is effected before or after receipt. In the cases where revocation cannot be considered voiding, e.g. if the sold animal gives birth to another, it is rendered invalid since the sale may not be voided with a separate increase in the object of sale. His proof that revocation is essentially a voiding is the fact that a sale is a positive statement resulting in exchange, while revocation is a negative statement resulting in reversal of such an exchange.

²⁵ Al-Kāsānī ((Hanafi), vol.5, p.306), 'Ibn Al-Humām ((Hanafi), vol.5, p.246 onwards), 'Ibn Ābidīn ((Hanafi), vol.4, p.151), Khuṣrū (1304H (Hanafi), vol.2, p.178).

²⁶ Al-Dardīr ((Mālikī)A, vol.3, p.155), 'Ibn Juzayy ((Mālikī), p.272), 'Ibn Ḥazm (, vol.9, p.7).

²⁷ 'Ibn Qudāmah (, vol.4, p.121 onwards), Marīt ibn Yūsuf (1st printing (Hanbalī), vol.2, p.52), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.96). Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.9, p.156) said: “If a sale is concluded, it may only be voided in one of seven ways: the contract session option, the condition option, the defect option, negation (*khwulf*) option, revocation, mutual oaths, and perishing of the object of sale.”

Thus, the sale is established for a third party (the Law), while the revocation is viewed as a voiding for the two parties themselves. The third party's significance can be shown in this example: A person buys a house while a third party has a preemption right (*shuf^cah*), and he did not use this right after knowing of the sale. Then, if the buyer and seller revoke the sale, the owner of the preemption right has a second chance to demand the satisfaction of his right, since the revocation is a second contract for this third party.

- 'Abū Yūsuf argued that revocation is a new contract for both parties as well as others. However, in cases where it cannot be rendered a sale, (e.g. if the revocation is effected prior to receiving a portable object) it is rendered a voiding. However, in other circumstances, including revocation prior to receipt of immovable objects, the revocation is considered a sale. His proof is that a sale is effectively the exchange of property for property, which is satisfied in revocation. In this regard, he argued that the content of the contract is the same as that of sale (exchange of properties), and this takes precedence over the form of the contract and its language.
- Muhammad argued that revocation is a voiding unless there is a legal reason it cannot be considered thus, then it would be considered a sale. Thus, he accepts the original argument of 'Abū Ḥanīfa that revocation is fundamentally a voiding, based on its linguistic and legal implications.
- Zufar, the Shāfi'īs, and many Ḥanbalīs, argued that revocation is a voiding with regards to all people.²⁸

The effect of this difference in opinion among the Ḥanafīs becomes apparent when we consider revocation with a larger or smaller price than in the original sale, with a price of a different genus, or with a deferred price in the revocation contract:

- According to 'Abū Ḥanīfa's opinion, the revocation is valid at the original price, and the conditions of increase, diminution, deferment, or change of genus of the price are invalidated. This is his opinion regardless of whether the revocation is effected before or after receipt, since it is a voiding with regards to the rights of the contracting parties. In this regard, voiding is a removal of the initial contract, which occurred with a certain price, and thus must be voided at the same price. Thus, any other stated price (higher, lower, deferred, or of a different genus) would be considered a defective condition in the revocation contract that is thus invalidated, and the revocation is binding at the original price.
- The ruling is the same according to Zufar's opinion, since he considers revocation a mere voiding with regards to the rights of all people. For the

²⁸ Al-Kāsānī ((Hanafi), vol.5, p.306), 'Ibn Al-Humām ((Hanafi), vol.5, p.247), 'Ibn Ḩābidīn ((Hanafi), vol.4, p.154), 'Ibn Rajab (1st edition (Hanbalī), p.379), ibid., *Al-Farā'id Al-Bahiyyah fī Al-Qawā'id Al-Fiqhiyyah* by Sh. Maḥmūd Ḥamza (p.68), Al-Suyūṭī ((Shāfi'ī), p.152), 'Ibn Qudāmah (, vol.4, p.121 onwards).

Shāfi'īs and Hanbalīs, on the other hand, the revocation in those cases would be invalidated itself based on the defective condition, in analogy to their ruling for sales with defective conditions. Thus, increases and decreases are not permitted in revocation for the Ḥanafīs, Shāfi'īs, and Hanbalīs, all of whom consider it a voiding of the initial contract. Thus, if revocation is concluded, and then the object of sale is affected with a separate increase (e.g. giving birth to a sheep), the revocation is no longer possible.

However, Mālik ruled that revocation is a new sale, thus permitting increase and decrease. Thus, if an item is sold for 100 gold coins, and the seller regretted the sale, and asked the buyer to return the merchandise in return for 110 gold coins, the revocation is permitted as a new sale. Similar practice is common today, where the seller will not revoke a sale based on the buyer's regret unless the buyer surrenders part of his right as compensation. However, Mālik does not permit the case where the buyer regrets having purchased an item for 100 gold coins deferred, and asks the seller to revoke the sale in exchange for 10 gold coins in cash or deferred. He does not permit this since it is a means by which the forbidden sale and loan in one contract can be effected (as if the buyer bought the item for 90 coins and lent the seller 10).²⁹ However, if the first sale was for a cash price, then there is no disagreement over the permissibility of the revocation as offered.

- According to the opinion of 'Abū Yūsuf, revocation at any stated price (with increase, decrease, deferment, or a different genus) is permitted, since he considers it a new sale.
- According to the opinion of Muḥammad, if the revocation is effected at a different price of different genus, or for a higher price, then it is a new sale, since it cannot be considered a voiding. In this regard, voiding would have to take place at the original price. If the specified price in revocation is of the same genus, and no larger than the original price, then he renders it a voiding, and invalidates the condition of diminution of price. Similarly, a condition of deferment of the price would be invalidated, and the revocation will be binding at the original price to be delivered at the time of revocation.

11.2.3 Conditions of validity

1. Mutual consent of the two contracting parties is necessary for validity of revocation. For 'Abū Yūsuf, this condition is obvious since he considers revocation a sale, which requires mutual consent as a condition of validity. For the majority of Ḥanafīs, the mutual consent condition follows since revocation is viewed by them as a voiding of the contract. Since the

²⁹Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.140).

contract was concluded by mutual consent, it can only be voided by mutual consent. This general condition for voiding is agreed upon.

2. In the case of revoking a currency exchange contract (*sarf*), the two compensations must be received during the revocation session. Again, this is obvious for 'Abū Yūsuf since this revocation for him is itself another currency exchange sale. For the other Ḥanafīs, mutual receipt during the contract session is a right of Allāh (swt). In this regard, while the revocation is a voiding with regards to the rights of the seller and buyer, it is a sale for the third party, which is the Law. Thus, for that third party the revocation in this case is a currency exchange sale, which requires mutual receipt during the contract session.
3. For 'Abū Ḥanifa and Zufar, the object of sale and price must be eligible for voiding, since they consider the revocation a voiding of the initial contract. Thus, if the object or price increased in a way that prevents voiding, the revocation is not valid.

For 'Abū Yūsuf, this condition does not apply, since he considers the revocation a sale, and any increase can be part of that sale.

Similarly for Muḥammad, this condition does not apply, since he renders the revocation a sale if it cannot be viewed as a voiding.

4. The object of the original sale must exist at the time of revocation. In this regard, the revocation is a removal of the initial contract, which is impossible if the object of sale perished partially or totally.

However, the existence of the price at the time of revocation is not a condition. The difference is that the original sale is established based on the object of sale and not the price. Thus, the continued existence of the object of sale is necessary for the removal of the contract, while the continued existence of the price is not.³⁰

In all cases, if the revocation is valid, the initial contract is voided and its legal status and effects are nullified.

³⁰Al-Kāsānī ((Hanafi), vol.5, p.308 onwards), 'Ibn Al-Humām ((Hanafi), vol.5, p.250 onwards), 'Ibn 'Abidīn ((Hanafi), vol.4, p.157).

Part III

The loan contract (*^caqd* *al-qard*)

Chapter 12

The loan contract (*caqd al-qard*)

Loans are generally similar to sales, since they involve the exchange of properties.¹ It is also a form of prepayment (*salaф*), since one of the two compensations is paid prior to the other.² Some of the jurists argued that loans are a subcategory of sales. However, Al-Qarāfi listed three differences between loans and sales. Three legal violations are tolerated in loans but not in sales:

1. Loans may be made with goods eligible for *ribā* (those measured by weight or volume for the Ḥanafīs and most of the Ḥanbalīs, foodstuffs and monetary numeraires for the Mālikīs and Shāfi‘īs). This violates the rules of *ribā*.
2. For goods not eligible for *ribā*, loans may be conducted where a known is traded in exchange for an unknown, which is a violation of the rule of *muzābanah*.
3. For fungible goods, loans may involve selling that which is not in the seller’s possession, which is not permitted in sales.

Those three rules are observed in sales but relaxed in loans. The reason for this relaxation of the rules for loans is to facilitate charitable behavior. In this regard, loans are permitted as a form of charity, where the lender gives up the usage of the goods for the period of the loan. This is also why loans are forbidden if they do not serve such a charitable cause, e.g. if the lender gets some benefit out of extending the loan.³

In what follows, we discuss loans in terms of their definition, legality, contracting parties and contract language, the legal status of options in loans,

¹ Al-Kāsānī ((Ḥanafī), vol.7, p.215).

² Ibn Qudāmah (, vol.4, p.313), ’Abū-’Ishāq Al-Shāṭibī (1970, vol.4, p.42).

³ Al-Qarāfi ((Mālikī), vol.4, p.2 onwards).

properties that may be object of the loan contract, and the legal status of a loan that results in benefit to the lender.

12.1 Defining loans

The Arabic term for loans, “*qard*”, literally means “cutting-off a portion”, signifying that the person extending the loan is giving the borrower part of his property. It is also called “*salaф*”, meaning “advance”, to signify that the amount of the loan is extended at some point, with the expectation of repayment at a later time.

The Hanafis define the contract legally as one in which a fungible property is paid from one party to another, in exchange for a later payment of an equivalent amount. Other schools of jurisprudence defined it as an exchange of property for a liability on the recipient equivalent to the amount he receives from the lender, where only the recipient of the loan is intended to benefit from the contract. They include different types of properties in this definition: fungibles, animals, and tradable goods.⁴

12.2 Legality of loans

Loans are permissible based on *Sunnah* (the Prophet’s (pbuh) tradition), as well as consensus of the Muslim community.⁵ In this regard, it was narrated on the authority of ’Ibn Mas’ūd that the Prophet (pbuh) said: “Every two loans extended by a Muslim to another count as one charitable payment”.⁶ It is also narrated on the authority of ’Anas that the Messenger of Allāh (pbuh) said: “On the day I ascended to heaven, I saw a writing on the door of paradise that read: ‘Eery charity is rewarded ten-fold, and every loan is rewarded eighteen-times’. I said: ‘O Jibrīl, why is a loan rewarded more than charity?’. He said: ‘Because a person may ask for charity when he does not need it, but the borrower only borrows in cases of dire need’.”⁷ We shall cite below a *Hadīth* on the authority of ’Abū Rāfi‘ regarding loans that bring the lender a benefit.

Thus, loans are highly recommended (*mandūb*) for the lender, and permissible for the borrower, based on the above listed *Hadīths*. This ruling is also based on the *Hadīth* narrated on the authority of ’Abū Hurayrah (mAbpwh) that the Prophet (pbuh) said: “Whoever relieves the hardship of a Muslim in

⁴Ibn ^cĀbidīn ((Hanafi), vol.4, p.179), *Hāshiyat Al-Dusūqī* (vol.3, p.222), Al-Dardīr ((Mālikī)B, vol.3, p.291).

⁵Ibn Qudāmah (, vol.4, p.313), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.117).

⁶Narrated by ’Ibn Mājah and ’Ibn Hibbān in his *Sahīh*, as well as Al-Bayhaqī. In all narrations, it is a *Hadīth marfū‘*, with its chain of narrations terminating at ’Ibn Mas’ūd. The narration of ’Ibn Mājah includes Sulayman ibn Bashīr in its chain, whose narrations are not accepted. However, the meaning of the *Hadīth* is supported in many other instances in the Qur'an and *Hadīth*; c.f. *Al-Targhib wa Al-Tarhib* (vol.2, p.41), Al-Shawkānī (, vol.5, p.229).

⁷Narrated by ’Ibn Mājah and Al-Bayhaqī on the authority of ’Anas ibn Mālik, and by Al-Tabarānī and Al-Bayhaqī in similar wording on the authority of ’Umāmah (mAbpwh); c.f. Al-Haythamī (, vol.4, p.126), *Al-Targhib wa Al-Tarhib* (ibid.).

this life, Allāh will relieve one of his hardships on the day of judgment; and whoever eases a financial difficulty for a Muslim, Allāh will relieve his difficulties in this life and the hereafter; and Allāh always assists the believer as long as he is assisting his brother".⁸

It is also narrated that 'Abū Al-Dardā' (mAbpwh) said: "I prefer to lend two gold coins, get them back, and lend them out again, to giving them away in charity", and 'Ibn Mas'ūd and 'Ibn 'Abbās are narrated to have said: "Lending something twice is better than giving (once and for all) it in charity".⁹ The Ḥanbalīs, on the other hand, ruled that charity is preferable to loans, and that a person who was asked to extend a loan and refuses is not sinful.¹⁰

12.3 Contract parties and language

The lender must have the right to deal in the property (e.g. through sales), since it involves a decision to transfer property. The contract requires an offer and an acceptance to be concluded. This follows since it involves transferring property from one human to another, thus requiring an offer and acceptance in analogy to the cases of sale and gift contracts. In this regard, the verbs used in the offer and acceptance may involve the terms "qard" or "salaf (loan or advance), or anything that carries that meaning, e.g. "I make this your property on condition that you will repay me an equivalent property".¹¹

12.4 Options or deferment in loans

While the Shāfi'īs and Ḥanbalīs permit the contract session option in sales, they do not permit it in loans. Moreover, all jurists agree that conditional options are not permitted in loans. In this regard, options are meant to allow one or both of the parties to void the contract. Since both parties in a loan contract can void it in any case, options become meaningless in this context.¹²

The majority of jurists do not permit any deferment conditions in loans. Thus, if the loan is deferred to a known term, this deferment is ignored, and the liability remains current. This follows since a loan has the same structure as selling one silver coin for another, thus deferment is forbidden to avoid effecting the forbidden *ribā al-nasī'ah*. In this regard, since the loan is considered a mere charitable contribution, the lender may demand repayment of its equal (in fungibles, where the repayment is determined in terms of equality of amount)

⁸Narrated by Muslim, 'Abū Dāwūd, Al-Tirmidhī (who rendered it *ḥasan*), Al-Nasā'ī, 'Ibn Mājah (in abridged form), and Al-Hākim, who said that it satisfied the criteria of Muslim and Al-Bukhārī; c.f. *Al-Targhib wa Al-Tarhib* (vol.2, p.44), Al-Haythamī (, vol.4, p.33).

⁹'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.302), 'Ibn Qudāmah (, vol.4, p.313).

¹⁰Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.83).

¹¹'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.302), 'Ibn Qudāmah (, vol.4, p.314), 'Ibn Ābidīn ((Hanafi), vol.4, p.179), Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.84).

¹²'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.303), 'Ibn Qudāmah (, vol.4, p.315), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.13, p.165), 'Ibn Ābidīn ((Hanafi), vol.4, pp.177-8).

at any time. This is in contrast to deferment in sales or leases, where the seller or lessor has no right to demand payment prior to maturity of the liability.

The Ḥanafīs, on the other hand, disagreed by permitting bindingness of deferment terms in loans in four cases:

1. If a person stipulates in his will that his heirs should lend a certain amount of money for a certain period of time, the heirs may not demand repayment of the liability prior to the passage of that period of time.
2. If the debtor denies the debt, and the creditor defers it, then the term of deferment is binding.
3. If a judge issues a legal decision that the term of deferment of a loan is binding, then it is, following the rulings of Mālik and 'Ibn 'Abū Laylā.
4. If the debtor transfers the debt to a third party through a bill of exchange (*hawālah*), and if the creditor had deferred the debt, then the deferment is binding. In this case, the deferment is not of a loan, since the original debtor is relieved of his liability through the bill of exchange. The deferment in this case is rather a deferment of debt (on the third party).

In summary, the Ḥanafīs permit deferment of loans, but consider the term of deferment non-binding except in the four cases listed above.

'Imām Mālik, on the other hand, ruled that the terms of deferment of loans are binding. He based this decision on the *Hadīth*: "Muslims are bound by their conditions".¹³ In this regard, since the parties of this contract have the right to revoke it or keep it in place, it is sensible to allow them to increase in its term of deferment.¹⁴ This is the most reasonable and practical opinion of those we have discussed.

12.5 Objects eligible for lending

Jurists differed over which objects may or may not be lent:

- The Ḥanafīs ruled that fungibles (i.e. goods measurable by weight, volume, size, and numbers of homogenous items) are eligible for lending. They also ruled based on the opinion of 'Imām Muḥammad that loaves of bread may be lent by weight or number, to satisfy an obvious need. This opinion regarding loaves of bread is shared by all schools of jurisprudence. On the other hand, the Ḥanafīs ruled that non-fungibles (e.g. animals, wood,

¹³Narrated by 'Abū Dāwūd, 'Ahmad, Al-Tirmidhī, and Al-Dāraqutnī on the authority of ^cAmr ibn ^cAwf Al-Muznī on the authority of his father and grandfather as a *Hadīth marfu'*. It was also narrated as a valid *Hadīth* by 'Ibn Hibbān on the authority of 'Abū Hurayrah, by Al-Hākim on the authority of 'Anas, by Al-Ṭabarānī on the authority of Rāfi' ibn Khudayj, by Al-Bazzār on the authority of 'Ibn ^cUmar, and by 'Ibn 'Abū Shaybah on the authority of ^cAtā'. Al-Bukhārī said that there is no doubt regarding this *Hadīth*, c.f. Al-Ṣan^cānī (2nd printing, vol.3, p.59), Al-Sakħāwī (, p.385).

¹⁴Ibn Qudāmah (, vol.4, p.315), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.303).

real estate, and non-homogenous countables) may not be lent, since it is difficult to find an equivalent good to repay the loan.¹⁵

- The Mālikīs, Shāfi‘īs, and Ḥanbalīs ruled that loans are permissible for all goods eligible for forward sale (*salam*), i.e. for all properties that can be established as a liability on the borrower. This includes goods measured by volume and weight (e.g. gold, silver, and foodstuffs), or non-fungibles (e.g. animals, tradable goods, etc.). This ruling is based on the tradition narrated by ‘Abū Rāf‘ī that the Prophet (pbuh) borrowed a camel,¹⁶ which is clearly not measured by weight or volume. In this regard, any goods eligible for forward sale are controlled by description, and thus may be lent just like goods measured by volume or weight. Thus, the relevant criterion is whether or not the goods for which the debtor is liable can be sufficiently regulated.¹⁷

Thus, the majority of jurists permit lending most goods that may be sold, with a few exceptions. For instance, while Ibn Taymiya permitted the lending of usufruct, the majority of jurists do not permit it (e.g. one person helps the other in reaping a crop so that the other will help him similarly on another day; or one person allows another to live in his house for a day so that the other would allow him to live in his house for a day, etc.). Moreover, they render impermissible loans of any items that cannot be established as a liability (e.g. part of a house, part of a garden, etc.). In this case, a loan requires repayment of an equivalent good, and those items do not have an equivalent counterpart. In this regard, the Mālikīs define equivalence in terms of similarity of characteristics and amount, while the Shāfi‘īs and Ḥanbalīs define it in terms of its form. Thus, they all agree that rare and expensive jewels may not be lent, since it is very likely that their equivalent cannot be found at the time of repayment.

12.6 Legal status of loans

’Abū Ḥanīfa and Muḥammad ruled that ownership of the lent goods is established through receipt. Thus, if a person borrows a volume of wheat and receives it, he has the right to keep it, and repay an equivalent volume of wheat whenever the creditor demands repayment of the volume he lent him. In this regard, ownership of the precise volume that was lent was transferred to the borrower, who was liable only for its equivalent and not for the lent goods themselves, even if they still existed in his possession. On the other hand, ’Abū Yūsuf ruled that

¹⁵Ibn ḡĀbidīn ((Hanafi), vol.4, pp.179,195), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.119), ’Ibn Qudāmah (, vol.4, p.318 onwards).

¹⁶The chains of narration of this *Hadīth* will be listed under the section of loans that are beneficial to the lender.

¹⁷Al-Dardūr ((Mālikī)A, vol.3, p.222), ’Ibn Juzayy ((Mālikī), p.288), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.118 onwards), ’Abū-’Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.303), ’Ibn Qudāmah (, vol.4, p.314), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.84 onwards).

as long as the lent goods remained intact, the borrower never gains ownership of those goods.¹⁸

The Mālikis ruled that loans, gifts, charity, and simple loans (*cāriyyah*) all establish ownership merely through the contract, even without receipt of the property. Thus, the borrower may return the actual borrowed items or their equivalent, whether the lent property was fungible or non-fungible. In this regard, returning the exact lent item is only allowed if it was not affected with any increase or diminution. In cases where the lent object has changed thus, repayment must be made by means of an equivalent good.¹⁹

The Ḥanbalis and most of the Shāfi‘is have ruled that ownership is established in loans by means of receipt. The Shāfi‘is further ruled that if the lent goods are fungible, then repayment must be made by means of equivalent goods. In the case of lent non-fungibles, repayment must be made by means of goods that take the same form. This opinion is based on the narration that the Prophet (pbuh) borrowed a young camel and repaid a more valuable older camel, saying: “The best among you are the best in repaying their debts”.²⁰

The Ḥanbalis, on the other hand, ruled in agreement with all other jurists that repayment of goods measured by weight or volume must be made by means of equivalent goods. They have two opinions, however, with regards to repayment of non-fungibles. One opinion states that repayment must be made in terms of the goods’ value on the day of origination of the loan, while the other opinion states that repayment must be made by means of goods that have approximately equivalent characteristics.²¹

Jurists from all four schools agreed that repayment of a debt must take place in the city where the loan originated. However, repayment elsewhere is permitted if the goods are easily portable with minimal cost and danger of theft or loss during transportation. Thus, if there is a cost or risk associated with receipt in a different city, the creditor is not bound to receive it anywhere other than the place where the loan originated.²²

12.7 Summary of validity conditions

1. Loans must be concluded through the appropriate language of offer and acceptance. The non-Shāfi‘is also allow loans that are concluded by mutual receipt (*mu‘ātāh*).
2. The lender and borrower must both be of legal age and have the mental faculties that makes him eligible to give charity. Thus, loans may not be

¹⁸ Ibn ‘Abidīn ((Hanafī), vol.4, p.181).

¹⁹ *Hāshiyat Al-Dusūqī* (vol.3, p.226), Al-Dardīr ((Mālikī)B, vol.3, p.295).

²⁰ The chains of narration of this *Hadīth* will be discussed below under the section dealing with loans that are beneficial to the lender and the *Hadīth* of ‘Abū Rāfi‘.

²¹ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.119 onwards), ‘Abū-‘Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.303), ‘Ibn Qudāmah (, vol.4, p.314).

²² Ibn ‘Abidīn ((Hanafī), vol.4, p.180), Al-Dardīr ((Mālikī)B, vol.3, p.296), Al-Dardīr ((Mālikī)A, vol.2, p.119), ‘Ibn Qudāmah (, vol.4, p.325).

extended by young boys, insane or mentally incompetent persons, coerced persons, or legal guardians (except when necessary), since such individuals are not eligible to give away property in charity.

3. The Ḥanafīs require that the lent goods be fungible, while the majority of jurists permit lending of any goods that may be established as a liability on the borrower (including non-fungibles such as homes and animals, etc.).
4. That the lent amount is known (in terms of volume, weight, number, or size), so that repayment of its equal is possible. Also, the lent goods should not be a mixture of two genera (e.g. wheat mixed with barley), since this would render repayment of its equal very difficult.

12.8 Valid and corrupting conditions

- Any condition that reinforces the right of the lender is permissible (e.g. pawning, guaranty, obtaining witnesses, documentation of the loan contract, or certifying it in front of a judge).
- As we have seen, the majority of jurists do not permit deferment conditions in loans, while the Mālikīs permit such conditions.
- Any condition that is not in accordance with the contract (e.g. stipulating a condition of increasing the repayment, repayment of goods in better condition than those lent, or selling a house) is rendered invalid.

In this regard, we distinguish between corrupting conditions (*al-shart al-mufsid*, which includes conditions of increase in repayment or a gift to the lender) on the one hand, and conditions that do not result in any benefit. Thus, conditions of returning a defective item when a good one was lent, or a condition that a third party extend a loan, are not corrupting, but merely nugatory (*laghw*).

12.9 Repayment timing and methods

We have seen that all jurists agree in the case of lent fungibles that an equivalent amount of the same good must be repaid. If the lent goods were non-fungible, the non-Ḥanafi jurists ruled that an equivalent in form must be repaid (e.g. a sheep of similar form).

The non-Mālikīs ruled that repayment must be made upon the creditor's demand at any time, since they do not permit deferment in loans. The Mālikīs, on the other hand, determine the repayment time to be the time of maturity of the loan, as defined by its term of deferment.

12.10 Loans beneficial to the lender

Most of the Ḥanafīs have ruled that any loan that results in a benefit to the lender is forbidden if the benefit was stipulated as a condition. However, they rule that if the benefit was not stipulated as a condition, and was not expected based on convention, then there is no harm. Thus, if the creditor is in possession of pawned items in lieu of the loan he extended, he is not permitted to use the pawned goods if such usage was stipulated as a condition or expected by convention. If neither of those situations apply, usage of the pawned items is still considered reprehensible to the point of prohibition, unless the one who pawned the goods gives his permission first. Some of the Ḥanafīs have ruled that using the pawned object is forbidden, even if permission is obtained. This final decision is indeed in agreement with the general legal approach to the prohibition of *ribā*. Similarly, a gift given to the lender is forbidden if it was stipulated as a condition, but is permitted otherwise.²³

The Mālikīs ruled that any loan that results in a benefit to the lender is defective, since it constitutes *ribā*. Thus, it is forbidden to benefit from any property of the borrower (e.g. riding his animal, eating in his house because of his indebtedness, etc.). Moreover, they render forbidden any gift given by the debtor to defer the debt, and that cannot be explained by any other brotherly motives or obligations. In this case, the prohibition applies both to the giver and the receiver. Thus, the recipient of such gifts must return them if they are intact, or pay their equivalent for fungibles and value for non-fungibles.

Repayment of debt with increase is permitted unconditionally (in amount or quality, before or after maturity of the debt) if the debt resulted from a sale. However, if the debt resulted from a loan, and if the increase was stipulated as a condition, was promised, or was expected based on convention, then it is strictly forbidden. However, the Mālikīs permit increases in quality in repayment of loans if they were not conditioned, promised, or expected. This opinion is based on the *Hadīth* that the Prophet (pbuh) borrowed a young camel, and returned a more valuable older camel. However, if the increase is in quantity rather than quality, the Mālikīs differed in opinion. In this case Mālik in the *Mudawwanah* ruled that it is permitted only if the increase is very small, while 'Ibn Ḥabīb permitted such increases unconditionally.²⁴

The Shāfi'īs and Ḥanbalīs ruled that any loan that results in a benefit to the lender is not permitted. Examples include lending a person an amount of money on condition that he sells him his house, or that he returns better than what was lent in quality or quantity. All such practices were banned in the *Hadīth* where the Prophet (pbuh) forbade a sale and a loan in one contract.²⁵ It is

²³ Ibn ^cAbīdīn ((Hanafi), vol.4, p.182), *Majma^c Al-Damānāt* (p.109), lecture notes on pawn-ing by Professor ^cAlī Al-Khaṭīf (p.96).

²⁴ Al-Dardīr ((Mālikī)A, vol.3, p.224 onwards), 'Ibn Juzayy ((Mālikī), p.288 onwards).

²⁵ This *Hadīth* has been discussed previously. It was narrated by 'Abū Dāwūd, Al-Tirmidhī, and Al-Nasā'i on the authority of ^cAbdullah ibn ^cAmr ibn Al-^cĀṣ. There is also a narration with different wording in Al-Ṭabarānī in his *Mu^cjam* on the authority of Ḥakīm ibn Ḥizām as follows: "The Messenger of Allāh (pbuh) forbade me from (1) combining a sale and a loan in one contract, (2) combining two conditions in one sale, (3) selling that which I have not

also narrated that 'Ubayy ibn Ka^cb, 'Ibn Mas^cūd, and 'Ibn ^cAbbās (mAbwt) all forbade any loan that results in a benefit to the lender.²⁶ In this regard, since the loan contract is a charitable one, any condition of benefit to the lender takes it out of the loan context. In this case, the loan is considered valid and the condition invalid, whether the benefit is financial or in-kind, substantial or small.

On the other hand, if a loan is extended with no conditions, and then the borrower repaid better than what he borrowed in quantity or quality, or purchased the lender's house, etc., then it is permitted. In such cases, it is not reprehensible for the lender to accept such voluntary benefits, based on the *Hadīth* narrated by Rāfi^c that the Prophet (pbuh) borrowed a young camel, and then received a charity of camels and ordered Rāfi^c to repay the man another young camel. Rāfi^c said that the closest he could find was a six-year-old camel (which is more valuable). Then the Prophet (pbuh) ordered him to give it to the man, and added "the best among you is the one who is best in repaying his debts".²⁷ In another narration, Jābir ibn ^cAbdullah (mAbwh) said that the Messenger of Allāh (pbuh) owed him a right, and he repaid him more than he owed him.²⁸

In this regard, we recall that the prohibition of any loan that results in a benefit to the lender is not a *Hadīth*, as proved in Al-Ḥāfiẓ Al-Zayla^cī (1st edition, (Hadīth)), and as discussed in previous footnotes. Moreover, Al-Karkhī and others have interpreted that prohibition as pertaining to the case where the benefit was stipulated as a condition or expected based on convention. As for lending to a party who has customarily repaid more than he borrowed, there are two opinions. The better of the two is the Shāfi^cī opinion, which makes lending to such party reprehensible. The other opinion is the dominant one in the Ḥanbalī school, and it permits lending to such parties without reprehension.²⁹

In summary, lending is permitted subject to two conditions:³⁰

1. That it does not result in a benefit to the lender (while a benefit to the borrower is permitted, naturally). If the loan is beneficial to both parties,

yet received, and (4) collecting returns without bearing the commensurate risk"; c.f. Al-Ḥāfiẓ Al-Zayla^cī (1st edition, (Hadīth), vol.4, p.19), Al-Haythamī (, vol.4, p.85).

²⁶This was mentioned in 'Ibn Qudāmah (, vol.4, p.319). It was also narrated by Al-Bayhaqī in *Al-Sunan Al-Kubrā* as a *Hadīth mawqūf* on the authorities of 'Ibn Mas^cūd, 'Ubayy ibn Ka^cb, ^cAbdullāh ibn Sallām, and 'Ibn ^cAbbās. It was narrated by Al-Ḥārith ibn 'Abī 'Usāmah in his *Musnad* on the authority of ^cAlī ibn 'Abī Tālib that "the Prophet (pbuh) forbade any loan that results in a benefit [to the lender]". However, the other narration "every loan that results in a benefit [to the lender] is *ribā*" is not accepted since its chain of narration includes Siwār ibn Muṣ^cab Al-Hamadhānī (the blind Mu^cadhdhin). Two other unacceptable versions were also narrated by Al-Bayhaqī and ^cAmr ibn Badr in *Al-Mughnī*; c.f. 'Ibn Ḥajar (, p.245), Al-Shawkānī (, vol.5, p.232), Al-Ṣan^cānī (2nd printing, vol.3, p.53). In any case, the meaning of this *Hadīth* is valid, and is supported by other legal principles.

²⁷Narrated by 'Ahmad, Muslim, and 'Aṣḥāb Al-Sunan Al-'Arba'a; c.f. 'Ibn Ḥajar (, p.245), *Al-Muwatta* (vol.2, p.168), Al-Shawkānī (, vol.5, p.230).

²⁸Narrated by Al-Bukhārī, Muslim, and 'Ahmad; c.f. Al-Shawkānī (, vol.5, p.231).

²⁹Al-Khatīb Al-Shirbī ((Shāfi^cī), vol.2, p.119 onwards), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi^cī), vol.1, p.304), 'Ibn Qudāmah (, vol.4, p.321 onwards), Mar^cī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.85 onwards).

³⁰'Ibn Juzayy ((Mālikī), p.288), Al-Dardīr ((Mālikī)B, vol.3, p.295).

it is only permitted if it is needed. This need will be discussed later in the context of letters of credit used to avoid the potential for losing goods to criminals in travel.

2. That no other contract (e.g. sale, etc.) is appended to the loan, based on the above mentioned *Hadīth* narrated on the authority of ^cAbdullah ibn ^cAmr by the five major narrators, forbidding a sale and a loan in one contract.

As for gifts from the debtor to the creditor, the Mālikīs prohibit the creditor from accepting such gifts based on *ribā*, while the majority of jurists permit it if it was not stipulated as a condition, and if it is a personal gift unrelated to the loan.

We note that monies deposited in savings accounts, investment certificates, and government bonds and treasury bills, inherit the legal status of loans. The government pays interest that constitutes *ribā* on such accounts, and uses the funds in lending with *ribā*. Thus, the interest payments collected by the depositors in such accounts are forbidden, since they are not truly “deposits” (*wadā’i*) as stated by some *muftis*. In this regard, if those monies were indeed “deposited”, those who receive those funds would not be permitted to use them in investment. Thus, by dealing in those received funds, they become in fact a loan, whereby the principal of that loan is guaranteed by a bank or government. In this regard, any fixed interest rate on such loans is not permissible for the depositors. Such returns would only be permissible if the funds are structured as silent partnerships (*muḍāraba*), whereby the silent partners’ profits are unknown, and they share in the risk of losses.

Similarly, demand deposits with banks are considered loans to the bank. Even if the bank does not pay interest on the funds in such accounts, those funds are used to make loans with *ribā* and other forbidden transactions. Thus, if a Muslim is forced by necessity to open such accounts to cover trade expenses for example, then he is permitted to do so based on the principle that necessities overrule prohibitions (*al-ḍarūrāt tubiḥ al-mahzūrāt*).

12.11 Letters of credit (*al-suftajah*)

With regards to letters of credit, whereby one party extends a loan to another, whose agent repays the loan to the first party or his agent in a different country, there has been a difference in opinions:

- The Ḥanafīs ruled that such transactions are reprehensible to the point of prohibition (*karāha tahrīmiyyah*) if the benefit of avoidance of risk in transportation to another country was a stipulated condition. Al-Mirghīnānī said in this regard: “Letters of credit are reprehensible since they are loans that give the lender the benefit of avoiding the dangers of the road, thus rendering it as one of the types of loans that result in a

- benefit to the lender forbidden by the Messenger of Allāh (pbuh)".³¹
- The Shāfi‘īs forbade letters of credit according to the same logic of being a loan that results in a benefit.³²
 - The Mālikīs have the same opinion as the Shāfi‘īs with regards to this contract.³³
 - The most accepted opinion among the Ḥanbalīs is permission of this transaction if it is done without any fees. ’Ibn Taymiya, ’Ibn Al-Qayyim, and ’Ibn Qudāmah ruled that letters of credit are unconditionally permitted, since they argued that the economic benefit from this contract is more general and not restricted to the lender alone.³⁴

12.12 Different types of Investment Certificates

Three types of “investment certificates” have been issued:

- Type (A) certificates pay a compounded return for the period of the investment (say 10 years) according to the advertised fixed interest rate.
- Type (B) certificates give the investors the right to withdraw the profits at specific times (e.g. every six months or one year), while the invested principal remains for the full time period.

Both of those types are loans with a specified and fixed rate of increase that is considered *ribā*. Thus, those productive loans are *ribā* and forbidden in the same manner as bank deposits, whether the intention was to use them simply as a deposit vehicle or as an investment.

- Type (C) certificates do not guarantee any fixed profit rate for each year. This type of investment certificates specifies a portion of the profits of the invested funds to be distributed by means of a lottery. Some jurists made the mistake of permitting this type of financial instrument. They argued that investors provide all funding, and give all profits as charity to the entrepreneur (the bank issuing those certificates). Such an arrangement would indeed be permitted under the Mālikī school.

In this regard, we find in *Al-Taqnīn Al-Mālikī* (p.300) two manners in which the interest paid by savings funds may be permitted:

1. This type of transaction did not exist in the early Islamic times when the Law was revealed, and thus may be considered one of those issues that the Law does not address. Since the transaction was not

³¹ Ibn Al-Humām ((Hanafi), vol.5, p.254).

³² Abū-'Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.304).

³³ Al-Kharṣī (1317H, 1st and 2nd editions (Mālikī), vol.4, p.141 onwards), ’Ibn Juzayy ((Mālikī), pp.250,288), Al-Dardīr ((Mālikī)A, vol.3, p.225).

³⁴ *Maṭālib 'ulī Al-Nuḥā* (vol.3, p.246), ’Ibn Qudāmah (, vol.4, p.321), ’Ibn Qayyim Al-Jawziyyah ((Hanbalī), vol.1, p.391).

addressed by the Law, and since it provides a benefit to both parties with no harm to either, it would be considered permissible. Moreover, since the most likely outcome is profitability of the investments, we build the legal ruling on that most likely outcome and ignore the unlikely possibility of incurring losses.

2. This transaction may be viewed as a form of *qirād* (silent partnership), which is permissible by the consensus of jurists. In this regards, we ignore the condition that the profits be a fixed proportion rather than a fixed amount, since standard forms of *qirād* hypothesize two private citizens as the parties to the contract, while we are now dealing with an entrepreneur who is a major bank or government.

However, in reality, this third type of investment certificates is also forbidden, since it relies on gambling. In this regard, dividing the total amount of *ribā* into different amounts and distributing them based on a pure chance also introduces significant and obvious injustice and inequity between the various investors, since the rate of return is not commensurate with the amount invested and the resulting risk exposure.

Part IV

The Lease Contract (*qaqd al-’ijār*)

Preliminaries

Leases, like sales, are among the contracts that are explicitly discussed in Islamic Law, thus obeying all the general rules governing contracts, as well as some rules specific to this particular type of contract. Leases differ from sales due to the time limitation involved in leases, in contrast to sales where no time limit is allowed. Due to the practical importance of the lease contract in daily life, I shall study its characteristics and status in seven chapters:

1. Legality, cornerstones, and essence.
2. Contract conditions.
3. Characteristics and legal status.
4. Two types of leases.
5. Guarantees in leasing.
6. Disagreements between the parties.
7. Termination of the contract.

Chapter 13

Legality, Cornerstones, and Essence

Jurists agreed that leases are permissible, with the exceptions of 'Abū Bakr Al-'Asamm, 'Ismā'il ibn 'Ulayyah, Al-Hasan Al-Baṣrī, Al-Qāshānī, Al-Nahrawānī, and 'Ibn Kayyisān, who did not allow it. The logic of the latter group is this: leases are a sale of usufruct. Since the usufruct is not received at the time of the contract, but are derived over time, leases thus constitute the sale of a nonexistent good, which is not permitted. Moreover, they could not legitimize it by considering the sale as a sequential process, since items may not be appended to the object of sale over time. 'Ibn Rushd debunked this argument by stating that while the usufruct did not exist at the time of the contract, their future existence is extremely likely. In this regard, the legality of the lease is derived from the part of the usufruct that is almost surely derivable, or where it is equally likely that the usufruct be derived or not.¹

The majority of jurists based their permission of the lease contract on the Qur'an, the Sunnah, and the consensus of Muslims:

- The Qur'anic proof is derived from the verses: "And if they suckle your offspring, give them their recompense" [65:6], as well as the story narrated about one of the two daughters of Shu'ayb (pbuh): "Said one of them: 'O father, hire him on wages, for truly the best to employ is a strong and trustworthy man'. He said: 'I intend to wed one of my daughters to you, on condition that you work for me for eight years, and if you complete ten full years, that will be a grace from you'." [28:26-27]. Using the latter verse as proof is valid based on the principle: "The Laws of those who came before us are applicable to us as long as they were not abrogated".
- The proof from the Sunnah is derived from the *Hadīth*: "Pay the hired worker his wages before his sweat dries off".² In this *Hadīth*, the order

¹Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.218).

²Narrated on the authority of 'Abū Hurayrah (by 'Abū Ya'clā in his *Musnad*), and also

to pay wages ('ajr) is clearly an indication of the validity of leasing the worker's labor for a period of time. Another *Hadīth* cited in this regard is: "Whoever hires a worker, he should inform him of his wage".³ A third *Hadīth* was narrated by Sa'īd ibn Al-Musayyib on the authority of Sa'īd (mAbpwh): We used to rent lands in exchange for water and seeds, but the prophet (pbuh) forbade us and ordered us to rent it with gold or silver [money].⁴ A fourth *Hadīth* was narrated on the authority of 'Ibn 'Abbas (mAbpwh) that the Prophet (pbuh) commissioned a man to cup for him, and paid him his wages.⁵

- It is also known that the Muslim nation during the time of the companions of the Prophet (pbuh) reached a consensus on the permissibility of leasing prior to the time of Al-'Aṣamm, 'Ibn 'Ulayyah, and others. In this regard, the observable usufruct of goods is of clear benefit to the people, thus rendering leasing such usufruct valid based on the validity of selling the objects themselves.⁶

13.1 Cornerstone and essence of leasing

The Ḥanafīs determined that the cornerstone in leasing is offer and acceptance, using the terms "lease" (*'ijārah* or *'isti'jār*) or rental (*'iktirā'* or *'ikrā'*). The majority of jurists, on the other hand recognize four cornerstones:⁷ two contracting parties (lessor and lessee), contract language (offer and acceptance), lease payment (rent), and extraction of benefit (usufruct).

The essence of leasing is the sale of usufruct. Thus, the Ḥanafīs defined the contract as: "A contract pertaining to usufruct, with a compensation".⁸ Since

on the authorities of 'Ibn 'Umar (by 'Ibn Mājah in his *Sunan*), Jābir (by Al-Tabarānī in his *Al-Mu'jam Al-Saghīr*), and 'Anas (by Al-Tirmidhī in *Nawādir Al-'Uṣūl*). However, 'Ibn Ḥajar stated that all of those narrations are weak; c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.129 onwards), Al-Haythamī (, vol.4, p.97), Al-Ṣan'ānī (2nd printing, vol.3, p.81).

³Narrated by 'Abdul-Razzāq in his *Muṣannaf* on the authority of 'Abū Hurayrah and 'Abū Sa'īd Al-Khudri. Also narrated by Muḥammad ibn Al-Ḥassan in *Kitāb Al-'Āthār* with a discontinued chain of narration. Al-Bayhaqī completed that chain of narration through 'Abū Ḥanīfa. However, 'Abū Zar'ah argued that the correct chain of narration is terminated (*mawquf*) at 'Abū Sa'īd; c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.131), Al-Ṣan'ānī (2nd printing, vol.3, p.82), Al-Shawkānī (, vol.5, p.292).

⁴Narrated by 'Ahmad, 'Abū Dāwūd, and Al-Nasā'ī with the wording: "The farmers during the time of the Prophet (pbuh) used to pay rent for the land in water and seeds. He (pbuh) forbade them from doing that, and ordered them to use gold and silver (money) to pay the rent"; c.f. Al-Shawkānī (, vol.5, p.179).

⁵Narrated by 'Ahmad, Al-Bukhārī, and Muslim. Al-Bukhārī added: "And if that payment were not legitimate, he would never have made it"; c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.134), Al-Shawkānī (, vol.5, p.285), Al-Ṣan'ānī (2nd printing, vol.3, p.80).

⁶Al-Sarakhsī (1st edition (Hanafī), vol.15, p.74), 'Ibn Al-Humām ((Hanafī), vol.7, p.147), Al-Kāsānī ((Hanafī), vol.4, p.173), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.218), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī)), 'Ibn Qudāmah (, vol.5, p.397), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.332).

⁷'Ibn Juzayy ((Mālikī), p.274), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.332).

⁸'Ibn Al-Humām ((Hanafī), vol.7, p.145), Al-Kāsānī ((Hanafī), vol.4, p.174), Al-Zayla'ī ((Hanafī Jurisprudence), vol.5, p.105), 'Ibn 'Abidīn ((Hanafī), vol.5, p.1).

sales may not be suspended, similarly leases may not be suspended. However, the majority of jurists allow contracting on future leasing (where both the usufruct and the rent are to be paid in the future), in contrast to sales where the object of sale and price may not both be deferred. The Shāfi‘īs are the exception to this rule, since they did not permit deferral of both the price and the object of sale, in analogy to the case in sales. However, they did permit its deferral as an established liability, e.g. “I make it a liability upon you to carry my furniture to this country at the beginning of the month”. This is permitted in their school since debts may be deferred, in analogy to the object of a forward sale (*salam*), which is established as a liability on the seller. Most Shāfi‘īs also permit extending the lease of an object prior to the termination of the prior lease, based on the unity of the object of lease, and the contiguity of the two lease periods.⁹

The Shāfi‘īs defined leasing thus: “It is a contract over a desirable, known, permissible, and accessible usufruct, in exchange for a known compensation”. This definition excludes viewing the lease as a contract regarding the object itself, since such contracts would have to be a sale or a gift. Rather, it is a contract over the object’s usufruct. The usufruct is stated as desirable, thus costless leases of goods with trivial usufruct is excluded. Also excluded are *mudāraba* and *ji‘āla* over an unknown work. The restriction of accessibility is necessary to ensure that either the whole object is leased, or none of it is leased, since it is impossible to derive usufruct from part of the object, which is thus not valid for leasing. Finally, the restriction of compensation excludes gifts of usufruct, including it in a will, partnership, or simple loan.¹⁰

The Mālikis defined leasing thus: “it is the transfer of ownership of permitted usufruct for a known period in exchange for a compensation”.¹¹ This is also the definition adopted by the Hanbalīs.¹²

Since leasing is essentially the sale of an object’s usufruct, most jurists forbid leasing of trees and vines to use its fruits, since the fruits are themselves physical objects eligible for sale. Similarly, leasing a sheep to use its milk, fat, wool, or offspring, is not allowed, since all such objects are physical items (*‘a‘yān*) that may not be derived based on a lease. Similarly, it is not permissible to lease water in a river, channel, or spring. Also excluded from leasing are lakes containing fish and forests containing animals, if the intended usufruct is fishing or hunting.¹³ Similarly, pastures may not be leased, since the animal fodder is also considered a physical object that can potentially be sold.

The majority of jurists also forbid leasing a male animal for reproduction, since its semen is considered a physical good. In this regard, it has been au-

⁹ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.338). We note that the Shāfi‘īs recognize two different types of leases: (i) leasing a fixed object to derive usufruct (e.g. real estate), or (ii) leasing a specific animal of individual’s labor (e.g. to transport goods, or make a dress, etc.), c.f. Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.333).

¹⁰ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.332).

¹¹ Al-Dardīr ((Mālikī)A, vol.4, p.2), Al-Qarāfī ((Mālikī), vol.4, p.4).

¹² Ibn Qudāmah (, vol.5, p.398), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.190), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.537).

¹³ Ibn ‘Ābidīn ((Hanafī), vol.4, p.110 onwards).

thentically narrated that the Prophet (pbuh) forbade leasing a male animal for copulation.¹⁴ Also impermissible is the rental of gold or silver coins, or any goods measurable by weight or volume, since the only usufruct derivable from such goods involves their consumption, while the lease is only a contract regarding the usufruct and not the object itself.¹⁵ Thus, the general rule we can derive from all such examples is this: “All goods that permit derivation of their usufruct while the object remains intact are permissible for leasing, otherwise the goods may not be leased”. The only exception to this rule is leasing a wet-nurse’s services due to necessity, as detailed below. Also, the Mālikīs permitted leasing the services of male animals for copulation, and most jurists permitted leasing pigeons.¹⁶

'Ibn Al-Qayyim's opinion on leasing

The basic rule used by jurists (that leases give permission to the lessee to the usufruct, but not to the object itself) is a defective rule. He reasoned that this rule was not derived from the Qur'an, the Sunnah, consensus, or valid inference by analogy. On the contrary, he argued, physical goods that continuously produce other goods while remaining intact (e.g. trees producing fruits, animals producing milk, wells producing water) are no different from physical assets that produce usufruct (e.g. living in a home, etc.). This equation of permissibility for physical assets and living animals is based on analogy to the permissibility of establishing either as a religious endowment. He also equated those categories of goods in simple loans to one who derives the usufruct and then returns the object intact. This similarity in legal status is derived from the fact that both categories of goods produce a benefit sequentially, be that benefit usufruct of the object (e.g. living in a house day to day), or be it another physical product (e.g. fruits every season, milk each day, etc.).¹⁷

¹⁴Narrated by Al-Bukhārī, 'Ahmad, Al-Nasā'ī, and 'Abū Dāwūd on the authority of 'Ibn 'Umar. It was also narrated by others with different wording, as we shall see below; c.f. Al-Shawkānī (, vol.5, p.146).

¹⁵Al-Kāsānī ((Hanafī), vol.4, p.175).

¹⁶'Ibn Juzayy ((Mālikī), p.273).

¹⁷'Ibn Qayyim Al-Jawziyyah ((Hanbalī), vol.2, p.15).

Chapter 14

Lease Conditions

There are four conditions for the lease contract, paralleling the four conditions for sale: conditions of conclusion, executability, validity, and bindingness. In what follows, we shall list some of those conditions, all other conditions can be found in the sales chapters.

14.1 Conditions of Conclusion

There are three types of conclusion conditions, some pertaining to the contracting parties, some to the contract itself, and some to the object of the contract. The most important condition pertaining to the contracting parties is sanity and discernment. Thus, leases by an insane person or a young non-discerning child are not concluded, in analogy to sales. In this regard, the Ḥanafīs do not require the child to reach legal age (puberty) as a condition of conclusion or executability. Thus, they allow a discerning child to lease his property or labor if he is permitted, otherwise those transactions would be suspended pending the approval of his guardian.¹

The Mālikīs ruled that discernment is a condition of conclusion and validity for both sales and leases, while reaching the legal age is a condition for executability. Thus, the lease of property or labor by a discerning child is valid, but the executability is suspended pending his guardian's approval.² The Shāfi'īs and Ḥanbalīs, on the other hand require as a condition of conclusion that the lessor be of legal age, and good mind. In this regard, they argue that leases result in property transfer, which render them similar to sales.³

¹ Al-Kāsānī ((Ḥanafī), vol.4, p.176).

² Al-Dardīr ((Mālikī)A, vol.4, p.3).

³ Al-Khatīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.332), 'Ibn Qudāmah (, vol.5, p.398).

14.2 Conditions of executability

Ownership or guardianship is a necessary condition of executability. Thus, leases by uncommissioned agents are not executable. The Ḥanafīs and Mālikīs follow their rulings in the case of sales by an uncommissioned agent, thus rendering such contracts concluded but suspended pending the approval of the owner, in contrast to the Shāfi‘īs and Ḥanbalīs.

In this regard, a suspended lease may be appended by permission under certain conditions, including the intactness of the object of lease. If an uncommissioned agent concludes a lease, and the owner of the property permits the contract to be executed, we consider multiple cases:⁴

- If the contract is permitted before the lessee extracts benefits from the property, the lease is permissible. In this case, the lessor is considered to be the owner. In this case, the object of the lease contract (the usufruct) was intact at the time permission was given.
- If the owner gives his permission after the benefit was derived from the leased object, the lease is not valid. In this case, the object of the lease (the usufruct) does not exist at the time permission is given, and thus the contract is not valid. The paid rent now belongs to the agent who concluded the lease, who is considered a usurper of the owner's property by delivering it to the lessee.

The Hanafis ruled that if a usurper leases the property he thus obtained and delivered it to the lessee, then the owner permitted such a lease, the rent belongs to the usurper if the period of the lease had terminated. This is based on the above analysis that shows that permission cannot be appended to a non-existent object of a contract. However, if only part of the lease period had passed at the time permission is given, then 'Abū Yūsuf ruled that the entire rent belongs to the owner, since the contract remains valid based on the remaining lease period. Muḥammad, on the other hand, ruled that the rent is shared between the owner and the usurper in proportion to the periods of the lease before and after the permission. Thus, he considers the object of the lease to be divisible by time, part of which would have vanished at the permission time and part of which would have remained.

This difference in opinion between 'Abū Yūsuf and Muḥammad was conducted over the issue of a usurper of agricultural land leasing the land for farming, and then the land-owner permits the lease. In this specific instance, Muḥammad added a further distinction if the usurper engaged in a crop-sharing (*muzāra'a*) contract:

- If the owner gave his permission at a time when the plants were bearing green kernels, then the crop sharing is valid, and the usurper gets no share of the crop. In this regard, he considers crop sharing a

⁴Al-Kāsānī ((Hanafi), vol.4, p.177).

contract over a single non-divisible object (the crop), and the ruling renders the owner's permission the true beginning of the contract.

- If the kernels had reached full maturity (and dried), then the crop sharing is finished, and the permission cannot be appended to such a contract. In this case, the crop-share goes to the usurper.

14.3 Conditions of validity

The validity conditions for leases can be divided into: ones pertaining to the contracting parties, and ones pertaining to the object of the contract, the rent, and the contract itself. Those conditions are:

14.3.1 Consent of the contracting parties

In analogy to sales, mutual consent is a condition of validity of the lease contract, following the verse: “O you who believe, devour not each other’s properties unjustly, but let there be among you traffic and trade by consent” [4:29]. This verse clearly applies since leasing is a form of trade in which properties are exchanged.⁵ This condition relates to the parties to a lease contract. Other later conditions will relate to the object of sale.

14.3.2 Knowledge of lease object

The object of a lease contract must be known sufficiently well to prevent any potential legal dispute. The type of ignorance that may lead to legal dispute would prevent delivery, thus negating the purpose of the contract. In this context, knowledge of the object of lease consists of three components: (i) knowledge of the type of benefit or usufruct to be derived from the object, (ii) knowledge of the period of the lease, and (iii) knowledge of the nature of labor in leasing the labor of skilled or unskilled workers.

1. Knowledge of the usufruct

This knowledge is often obtained through knowledge of the leased object. Thus, if a person tells another: “I have leased to you one of those two homes”, the contract would not be valid based on significant ignorance. If a person leases a dried-up river to use it as a channel to bring water to his land, most Hanafis ruled that the lease is not valid. This is the opinion of 'Abū Ḥanīfa and 'Abū Yūsuf, since they argued that the amount of water to be driven through that dry river can be large or small. In this regard, a large amount of water driven through can cause significant corrosion. Such destructive use of the property is clearly disallowed, but the lease contract does not give criteria by means of which that problem is avoided. Thus, the object of contract is rendered unknown. On the other hand, it was reported that Muhammad ruled with the

⁵ Al-Kāṣānī ((Hanafi), vol.4, p.179).

permissibility of such leases. His argument is that the only ignorance that can affect this contract is ignorance of the exact piece of land being used, and that information is indeed provided in the contract.⁶

2. Knowledge of the lease period

This type of knowledge is necessary for the leases of real estate and wet nurses, since, without determining the lease period, the amount being leased would be unknown, leading to legal disputes. In this regard, most jurists, agree that leases are permitted for any period, short or long.⁷ The majority of Shāfi‘īs added that leases are permitted for any period as long as the leased object is likely to exist based on expert estimates. They do not impose any general upper limits on leases, since they find no legal proof for such limits.⁸

The Hanafis do not require that the beginning time of the lease be specified in the contract. If the beginning time is not mentioned, the default would be the beginning of the month after the contract is concluded. The Shāfi‘īs, on the other hand, require explicit specification in the contract of the beginning time of the lease, since ignorance of the beginning time results in ignorance of the object of the contract.⁹

If the lease contract specifies its period in terms of the number of months or years, it is interpreted to mean lunar months and years. If the contract specifies fractions of a month, the month is considered to be 30 days. Similarly, if the contact commences in the middle of a month, and its period is specified in terms of numbers of months or years, then ’Abū Ḥanīfa and ’Abū Yūsuf ruled that all months are then measured in days. However, if the contract commences on the “day of a month, and the contract specifies the period in months or years, then lunar months are implied.

Another opinion was reported on behalf of ’Abū Ḥanīfa shares the opinions of Muhammad and the Shāfi‘īs. According to this opinion, if a man leased a house for one year, and commenced the lease during part of a month, then he lives in the house for the remainder of this month, and completes the days of the first month during the last month. The middle 11 months are then assessed based on standard lunar calendar. In this regard, they convert the period stated in the contract into days only as necessity requires, which is only for the first month. In contrast, the first listed opinion was based on the argument that if the first month is measured in days, then all subsequent months must be

⁶Al-Kāsānī ((Hanafi), vol.4, p.180), Al-Sarakhsī (1st edition (Hanafi), vol.16,p.43), Al-Qarāfī ((Mālikī), vol.4, p.4), ’Ibn Al-Humām ((Hanafi), vol.7, p.148).

⁷The Hanafis argued for this permission to document the amount being leased. They made an exception for religious endowments (*'awqāf*), for which they did not permit long leases lest the lessee can claim ownership. The limit they put in place to prevent this problem is three years for real estate and one year for other properties. A similar restriction was imposed for leasing land owned by an orphan, for similar reasons; c.f. ⁸’Abd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.88), ’Ibn Al-Humām ((Hanafi), vol.7, p.150).

⁸Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.349), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.396), ’Ibn Qudāmah (, vol.5, p.401), Marṣī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.201).
⁹’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), ibid.).

measured thus.¹⁰

Month-to-month leases

The Shāfi‘īs were particularly strict in their requirement of specifying the period of a lease. Thus, they explicitly invalidate month-to-month leases, since each month’s lease in this case requires a new contract. Since a new contract is not written in this month-to-month practice, the overall contract is rendered invalid. In addition, there is substantial ignorance about the lease period in such a contract, which invalidates it, as if the lessor had said: “I leased you this house for a month or a longer period”.¹¹

The majority of jurists ruled in this case that the lease is valid and binding for the first month. The lease is considered binding for each subsequent month once that month starts. In this regard, the legality of the lease is derived from knowledge and agreement of both sides on the rental. Thus, the implicit contract in each subsequent month is treated as analogous to physical exchange sales (*mu‘āṭfah*), where the initial drafting of the contract and subsequent indications of continued mutual agreement suffice.¹²

Knowledge of the work for which a worker is hired

When the labor of a worker is leased, knowledge of the type of work to be performed is crucial to avoid ignorance. Such ignorance can clearly be sufficiently substantial (is the worker supposed to sew a dress or tend to the sheep) to cause legal disputation. In this regard, when hiring a worker, the genus, type, amount, and characteristics of the work to be performed under the contract must be specified clearly.¹³

Joint specification of time period and work

We have seen that specification of the time period is necessary in leases of real estate and other objects for their usufruct. We have also seen that the type of work to be done must be specified in leases of labor. One may thus ask: is it permitted and/or required to combine the two conditions and stipulate that amount of time to be spent on a specific task?

The Hanafīs ruled that it is not necessary to specify the type of work when renting objects for their usufruct. Thus, a man may rent a commercial property without specifying the type of work he will conduct therein. Similarly, when leasing a house, the person may live there alone, or sublet the whole space or

¹⁰ Ibn Al-Humām ((Hanafi), vol.7, p.178), Al-Kāsānī ((Hanafi), vol.4, p.181), Al-Sarakhsī (1st edition (Hanafi), vol.15, p.132), Al-Zayla‘ī ((Hanafi Jurisprudence), vol.5, p.123), ’Abū-’Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.396), ’Ibn ‘Abidīn ((Hanafi), vol.5, p.35).

¹¹ ’Abū-’Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.396), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.340), Al-Shā’arānī’s *Al-Mizān* (vol.2, p.95).

¹² Al-Kāsānī ((Hanafi), vol.4, p.182), Al-Zayla‘ī ((Hanafi Jurisprudence), vol.5, p.122), Al-Dardīr ((Mālikī)A, vol.4, p.44), ’Ibn Qudāmah (, vol.5, p.409), ’Ibn Juzayy ((Mālikī), p.275 onwards).

¹³ Al-Kāsānī ((Hanafi), vol.4, p.184), Al-Sarakhsī (1st edition (Hanafi), vol.16, p.47).

a part thereof. He may also store goods there, and use it in any manner that does not harm the property or lead to structural damage. In this regard, if no conditions are stipulated in the lease, the contract is only constrained by convention (thus, the lessee of a house is not supposed to rent it to a blacksmith or a miller).

In leases of labor, they ruled that for certain tasks (e.g. tending to the sheep), the time period must be specified, since the amount of the leased good is unknown otherwise. However, for other tasks (e.g. leasing the labor of a shoe-maker to make a shoe), the time period need not be specified, since the amount of work can be known by examining the product. If the worker's labor is leased exclusively to one party alone, then the exact nature of the work need not be specified, but only the time period for which he provides his labor to the lessee. Similarly, only the time period needs to be specified for hiring a wet-nurse.¹⁴

With regards to the joint specification of the time-period of the lease as well as the exact nature of the work to be done, there are multiple opinions:

- 'Abū Ḥanīfa ruled that if the time period is specified, then the amount of work that needs to be done may not be simultaneously specified. Thus, he ruled that hiring a person to sew a dress on a specific day, or hiring an animal to go to a specific place on a specific day, are invalid.

His logic is that the object of the lease is thus unknown, since the contract specifies two things (the work to be done, and the period of time), each of which may by itself be the subject of a contract. In this regard, leasing the worker's time specifies his wage as a function of time without regard to the work, and hiring him to do a task specifies his wage as a function of the work without regard to the time. In the first case, the worker is exclusively hired by the other party, and in the other, his time may be shared by many other contracts. Since neither of the two implicit contracts has priority over the other, this results in ignorance that invalidates the contract.

- 'Abū Yūsuf and Muḥammad, on the other hand, ruled that it is permissible to specify both simultaneously.

Their logic is that the object of lease in both cases is the work, which is what the lessee wants. In this regard, the work is known in the contract that specifies both the work and the time period, and the latter is mentioned only to ensure that the work is expedited. Thus, if the worker finishes the task before the entire work period elapses, he still earns his wages. Conversely, if he does not finish the task during the specified period, he has to finish it as soon as possible to earn his wages.¹⁵

¹⁴tr.: Here and elsewhere, we note that the term '*lājär*' can be used simultaneously to mean "lease" as well as "hire", where the distinction, depending on whether the leased object related directly to a human being (e.g. his time vs. his house).

¹⁵Al-Kāsānī ((Hanafi), vol.4, p.184).

- The Hanbalīs ruled in the cases of leasing a worker's or animal's services to build a wall, sew a shirt, or carry goods, that joint specification of the work and the time period is permitted if the provider of the work can be controlled. If the object of lease is an object rather than work (e.g. a house), then only the time may be specified, since mentioning both the time and the work to be done in the house constitutes a form of *gharar*. In the latter case, if a building is rented for a day to do a task, then the task is done in half the period, any further usage of the building would be beyond the contract, and if he does not use it, he would have abandoned part of his right. Moreover, the work may not be finished during the specified period, then if he finishes it, he would be using the space beyond the specified period, and if he doesn't he wouldn't have finished the job upon which the contract was written. Thus, in all such cases, an unnecessary form of *gharar* is introduced.¹⁶
- The Mālikīs and most of the Shāfi‘īs ruled that it is not permitted in leases of a worker's time (e.g. to sew a shirt) to jointly specify the time period and the work to be done. Such joint specification introduces *gharar*, since the work may be done in less or more than the specified time. They thus make the analogy between such joint specification, and a forward buyer specifying both the volume and weight of an amount of wheat that is the subject of the forward contract. In this case, if the volume specification is observed, the weight may vary, and vice versa. Thus, to avoid such problems, and eliminate the potential *gharar*, they ruled that the work should be specified, but the time period should not.¹⁷

14.3.3 Legal and physical availability of lease object

It is not permitted to lease an object that may not be delivered materially (e.g. a runaway camel or the speaking services of a mute person) or legally (e.g. leasing the services of a doctor to extract a healthy tooth). Jurists agree that both types of non-deliverability would violate the conditions of the lease contract.

'Abū Ḥanīfa, Zufar, and the Hanbalīs ruled that a jointly owned property may not be leased by one of the owners. For instance, it would not be permitted for a joint owner of a house to lease his share of the house independently of the other owners, whether the share is known (e.g. one quarter) or unknown. In this case, the usufruct of the jointly owned property requires delivery of the entire property, and no part thereof may be delivered alone. However, it has been reported that 'Abū Ḥanīfa permitted one partner leasing from the other partner. In this case, the full usufruct of the house is divided into the part permitted by ownership and the part permitted due to the lease, with no need for further compensation. He also ruled that joint ownership that is effected

¹⁶ Ibn Qudāmah (, vol.5, p.402), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.302).

¹⁷ Al-Qarāfi ((Mālikī), vol.4, p.12), 'Ibn Juzayy ((Mālikī), p.274), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.3, p.340).

during the lease does not affect it. In the former case, joint ownership led to the impossibility of delivering the property to the lessee. However, in the latter case, deliverability is not a condition for the continuation of the lease contract. In general, the conditions required at the initiation of the contract may not be required to hold for its continuation.¹⁸

On the other hand 'Abū Yūsuf and Muḥammad permitted leasing jointly owned property to one of the partners or to any other. In this regard, they ruled that the usufruct may be delivered by removing obstacles, as in the case of a sale. In fact, the lease is indeed a sale [of usufruct].¹⁹

The varying Ḥanafī deliverability condition leads to the following conclusions:

1. If a person leases a road that passes through another's house for passage at a specific time, 'Abū Ḥanīfa would render the lease impermissible, while 'Abū Yūsuf and Muḥammad would render it permissible.
2. If a person leases a piece of land used as a field of alfalfa for a year, the contract is rendered defective. In this case, the land cannot be delivered without removing the alfalfa, which is a loss for the lessor. Since the lessor may not be forced to incur such a loss, the usufruct of the land is legally nondeliverable, and thus its sale is not permissible. However, if the owner were indeed to remove the alfalfa and deliver the land, the contract becomes valid since the obstacle to deliverability is no longer present. This is in analogy to the case where the buyer of a beam in the ceiling of the house, if the beam is indeed extracted, where the buyer is obliged to accept the execution of the sale. Similarly, the lessee is obliged to accept the land once the alfalfa is removed.
3. It is not permitted for a person to lease the services of another to trade. This follows since trading requires two parties: a buyer and a seller. Since neither the lessor nor the lessee can perform that trading task on their own, the usufruct cannot be delivered. This is in analogy to the case where a person's services are leased to lift an object that he cannot carry by himself. However, if the lease is conducted over a fixed period of time during which the leased trades on his behalf, then the contract is valid. In the latter case, the usufruct is the known period of time for which the hired trader will work.
4. It is not permitted to lease the mating services of a male animal, or a trained animal or bird for hunting. In those cases, the lessor may not be able receive the usufruct since the animals cannot be forced to perform those services. This is the opinion of the majority of Ḥanafī Shāfi'i and

¹⁸See 'Ibn Al-Humām ((Hanafī), vol.7, p.180), Al-Kāsānī ((Hanafī), vol.4, p.187), Al-Zayla'i ((Hanafī Jurisprudence), vol.5, p.125), 'Ibn 'Abidīn ((Hanafī), vol.5, p.32), Mar'i ibn Yūsuf (1st printing (Hanbalī), vol.2, p.197), Al-Dardīr ((Mālikī)A, vol.4, p.19).

¹⁹'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.225), Al-Shāfi'i ((Shāfi'i), vol.2, p.96), 'Abū 'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.395).

Hanbalī jurists.²⁰ Their opinion is based on the Prophet's (pbuh) prohibition of leasing the mating services of a male animal.²¹ On the other hand, 'Imām Mālik permitted the contract of leasing such services for a fixed period of time, in analogy to the above mentioned lease of various other usufructs.²²

14.3.4 Permissibility of the usufruct

Jurists are in consensus²³ that it is not permitted to lease the services of an individual for Unseemly games, teaching of magic, the writing of subversive books, sensuous singing or wailing, etc. All such cases would constitute a transgression of the Law, and such transgressions cannot be enforced through contracts. However, the Ḥanafīs ruled that leasing the services of someone to write songs is permitted, since it is the singing itself that is forbidden. The general juristic rule may be summarized thus: "It is not permissible to lease someone's services to commit a transgression".²⁴

Similarly, it is not permitted to hire a person to kill another, incarcerate him, or assault him, without just legal cause. The hired person in all such cases would be committing a sin, which renders the usufruct legally undeliverable. However, hiring an individual to execute a legal penalty of cutting a limb, etc., is permitted. On the other hand, 'Abū Ḥanīfa and 'Abū Yūsuf ruled that hiring a person to exact a rightful legal revenge (*qisās*) is not permitted, since the hired party may make a mistake in exacting the legal revenge, thus committing a transgression. On the other hand, Muḥammad ruled that such hiring is permitted, since the exact permitted penalty is well known.²⁵

Also, the majority of jurists ruled that it is not permitted for a non-Muslims to rent a Muslim's property for use in non-Islamic prayers, the sale of alcoholic drinks, gambling, etc. All such cases involve sinful usage of the property. In the past, 'Abū Ḥanīfa did permit the rental of property in Iraq to Maggians who used it for prayers, ruling that this was in an area where the majority were Maggians, and thus the lease did not undermine the status of Muslims.²⁶

²⁰ Ibn Al-Humām ((Hanafi), vol.7, p.179), Al-Kāsānī ((Hanafi), vol.4, p.189), 'Ibn Ḩābidīn ((Hanafi), vol.5, p.38), Ibn Qudāmah (, vol.5, p.500), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'i), vol.1, p.394), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.335), Marṣī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.197).

²¹This *Hadīth* was narrated by Al-Bukhārī, 'Abū Dāwūd, Al-Nasā'ī, and 'Aḥmad on the authority of Ibn 'Umar. There are also many narrations of the authority of other companions, such as Anas, Ibn 'Abbās, 'Alī, and 'Abū Hurayra, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.135), Al-Shawkānī (, vol.5, p.146).

²²Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.322), 'Ibn Juzayy ((Mālikī), p.275).

²³Ibn Al-Humām ((Hanafi), vol.7, p.180), Al-Kāsānī ((Hanafi), vol.4, p.189), Al-Zayla'ī ((Hanafi Jurisprudence), vol.5, p.125), Al-Dardīr ((Mālikī)A, vol.4, p.21), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.218), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'i), vol.1, p.394), Ibn Qudāmah (, vol.5, p.502), 'Ibn Juzayy ((Mālikī), p.275), Marṣī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.196), Al-Qarāfī ((Mālikī), vol.4, p.4).

²⁴Al-Farā'id Al-Bahiyya fī Al-Qawā'id Al-Fiqhiyya by Sh. Maḥmūd Ḥamza (p.76).

²⁵Al-Kāsānī ((Hanafi), vol.4, p.189).

²⁶Al-Kāsānī ((Hanafi), vol.4, p.176), Al-Sarakhsī (1st edition (Hanafi), vol.16, p.38), 'Ibn Qudāmah (, vol.5, p.503).

14.3.5 Hiring for religious obligations

For instance, it is not permitted to hire a person to perform a legal obligation that was incumbent upon him before the contract. In this regard, a person should not receive any monetary compensation for performing an obligatory act like paying his debts. Thus, it is not permitted to hire individuals to perform religious acts such as calling for prayers, leading prayers, teaching Qur'ān, etc. Hiring individuals for such activities would alienate individuals from community prayers and learning Qur'ān and religious sciences.²⁷ In this regard, it was narrated that "Uthmān ibn abī al-Āṣ said: "The last order I received from the Prophet (pbuh) was to get a caller for prayers who does not collect a wage for his service". Al-Tirmidhī rendered this a good *Hadīth*.²⁸

The Ḥanafīs summarize those rulings as follows: "Whoever is hired to perform an act of obedience to Allāh does not deserve a wage", and "hiring an individual to perform his obligations is not permitted". Thus, a person hiring their spouse to perform their domestic duties is not permitted.

Later scholars ruled that it was permitted for a teacher to collect wages for teaching the Qur'ān to others. 'Imāms Mālik and Al-Shāfi'ī ruled in this regard that hiring an individual to teach the Qur'ān to others is permitted since the work is known, and the wages are known.²⁹ As evidence, they cite that the Prophet (pbuh) "married a woman to a man, with the Qur'ān he had memorized as dowry", thus proving that the Qur'ān can be a compensation in a contract.³⁰ It has also been narrated that the Prophet (pbuh) said: "The most worthy way for you to collect wages is teaching the Book of Allāh".³¹ This is a valid *Hadīth*. It has also been established that 'Abū Sa'id Al-Khudriy performed a healing blessing (*ruqyah*) for a man with the *Fātiha* (first chapter of the Qur'ān) in exchange for a wage, and the man was healed of his sickness. The friends of 'Abū Sa'id took the compensation to the Prophet (pbuh) to ask him if it was legitimate. He (pbuh) said: "Some people collect wages for false blessings; but this is a valid healing blessing you collected, eat from it, and I shall eat too".³²

²⁷ Al-Kāsānī ((Hanafi), vol.4, p.191), 'Ibn Qudāmah (, vol.5, p.506 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.16, p.37), Al-Zayla'ī ((Hanafi Jurisprudence), vol.5, p.124), 'Ibn c-Ābidīn ((Hanafi), vol.5, p.38), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.205,217), *Al-Farā'id Al-Bahiyya fī Al-Qawā'id Al-Fiqhiyya* by Sh. Maḥmūd Ḥamza (pp.75,284), *Al-'Ifsāh* by Ibn Hubayra (p.226).

²⁸Narrated by the authors of the *Sunan* with different wording. The wording quoted here is that of Al-Tirmidhī and Ibn Mājah, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.139).

²⁹Al-Dardīr ((Mālikī)A, vol.4, p.16), 'Ibn Rushd Al-Hafid ((Mālikī), vol.1, p.221), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.344), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.398), Al-Shā'arānī ((Shāfi'ī), vol.2, p.95), 'Ibn Juzayy ((Mālikī), p.275).

³⁰Narrated by Al-Bukhārī, Muslim, and 'Alīmad that the Prophet (pbuh) said to them: "I have married you to one another with what the man knows of the Qur'ān [as dowry]", c.f. Al-Shawkānī (, vol.6, p.170).

³¹Narrated by Al-Bukhārī in his medicine chapter on the authority of Ibn c-Abbās, along with many other *Hadīths* with the same meaning, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.139), Al-Haythamī (, vol.4, p.94), Al-San'a'anī (2nd printing, vol.3, p.81).

³²Narrated by 'Alīmad and the narrators of the six books with the exception of Al-Nasā'ī on the authority of that 'Abū Sa'id Al-Khudriy. Another similar event was narrated on the

Moreover, the Ḥanafī author of *Kanz Al-Daqāiq* said: The *fatwā* (ruling) today is that it is permitted to hire an individual as a teacher of Qur’ān, as ruled by the later jurists of Balkh.

The Mālikīs permitted collecting wages for calling for prayers together with leading the prayers and taking care of the mosque. However, they did not permit collecting wages for leading the prayers alone, in analogy to the impermissibility of collecting wages for the performance of religious obligations. The Mālikīs and Shāfi‘īs also permitted hiring an individual to perform pilgrimage (*Hajj*) on another’s behalf. Their proof is the fact that the Prophet (pbuh) permitted one of his companions to perform pilgrimage on another’s behalf. However, the Shāfi‘īs explicitly rendered impermissible the payment of wages for leading the prayers, and the majority of the Mālikīs concurred that the payment of such wages for leading the prayers as separated from performing the ‘*adhā* is impermissible.³³

There is a consensus that hiring a teacher of language, literature, mathematics, writing, jurisprudence, *Hadīth*, etc. is permissible. Also, hiring individuals to build mosques and infrastructure, etc. is permissible. All such actions are not religious obligations, and may or may not be means of getting closer to Allāh. Hence, individuals may be hired and paid wages to perform such tasks.

The Ḥanafīs do not permit paying individuals wages for ritual cleansing of the body of a deceased Muslim, since it is a religious obligation. However, they permitted the payment of wages for digging graves and carrying the bodies of the deceased. On the other hand, the Shāfi‘īs permitted hiring individuals to prepare and bury the bodies of Muslims. Their proof was the fact that cleansing and preparing the deceased Muslim’s body is an obligation for the community to perform (*fard kifāyah*), but not for any given individual. Thus, even if only one person was in a position to perform this community obligation, it is still permitted. This is in analogy to one who is obliged to feed a person who would otherwise die of hunger. In the latter case, the obligation to feed the person does not forbid the collection of the price of the food thus given.

It is not permitted for a man to pay compensation for his wife’s suckling of their child. Such payment would constitute hiring her to take care of the child, which is an obligation on her in the eyes of Allāh.³⁴

14.3.6 Hired individuals benefiting from their work

Thus, it is not permitted to hire an individual to perform an act of obedience to Allāh for which he receives a reward.³⁵ Also, it is not permitted to hire an

authority of Khārijah ibn Al-Salṭ on behalf of his uncle, and a third event on Jābir, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.138), Al-Shawkānī (, vol.5, pp.289,291), Al-Haythamī (, vol.4, p.96).

³³ Al-Ṣan‘ānī (2nd printing, vol.2, pp.181,184), Al-Khatīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.344), Al-Qarāfī ((Mālikī), vol.3, p.2), ‘Uṣūl Al-Fiqh Al-Islāmī by Dr. Al-Zuhaylī (vol.1, p.60 onwards, 139).

³⁴ Al-Kāsānī ((Ḥanafī), vol.4, p.193).

³⁵The Shāfi‘īs ruled that hiring an individual to recite the Qur’ān near a grave, in a given amount or a given period of time, is permitted. In such cases, the usufruct of the reading is the

individual to grind a certain measure of wheat into flour or squeeze a certain measure of sesame, where the price is a share in the flour or oil, respectively. In such cases, the hired individual benefits from his work, and is working for himself. This follows since the Prophet (pbuh) prohibited the hiring of a male animal for mating and the hiring of a worker to grind wheat with his wages paid in flour.³⁶ The Shāfi‘īs ruled similarly based on the same *Hadīth*, as well as the violation of another condition of the lease contract, which the deliverability of the price at contract time.³⁷

The Ḥanafīs summarize this ruling under the heading for impermissibility of hiring an individual with “the wages being specified as part of the work performed by the hired worker”. The Ḥanbalīs and Mālikīs, on the other hand, ruled that such contracts were indeed permissible if the amount of the wages was clearly specified, since they do not accept the validity of the above mentioned *Hadīth*.³⁸ Thus, the Ḥanbalīs permitted the common practice whereby farmers pay the threshers or carriers of wheat in kind.

14.3.7 Customary use of lease contracts

Thus, renting trees to dry clothes on them,³⁹ or to use their shade, is not permitted since this is not a common usage of the trees.⁴⁰

14.3.8 Location conditions for the leased object

If the leased object is movable, then it must be in the possession of the lessor. This follows from the Prophet’s (pbuh) prohibition of “selling that which is not in the seller’s possession”.⁴¹ In this regard, since the lease contract is a form

mercy of Allāh that would benefit the dead as well as the living. This ruling is independent of whether or not the recitation of the Qur’ān is followed by a supplication, and whether or not the reciter asks Allāh to give the blessings of the recitation to the deceased. In all such cases, the deceased would still receive a benefit like a present live person who hears the recitation, c.f. Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.341).

³⁶Narrated by Al-Dāraqutnī on the authority of ‘Abū Sa‘īd Al-Khudriy, c.f. Al-Shawkānī (, vol.5, p.292), ‘Ibn Hajar (, p.255).

³⁷Al-Kāsānī ((Ḥanafī), ibid.), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.335), *Al-Farā’id Al-Bahiyya fī Al-Qawa‘id Al-Fiqhiyya* by Shaykh Maḥmūd Ḥamza (p.78).

³⁸Ibn Qudāmah (, vol.5, p.449), Al-Dardīr ((Mālikī)A, vol.4, p.6), ‘Ibn Juzayy ((Mālikī), p.274 onwards).

³⁹Al-Qarāfī ((Mālikī), vol.4, pp.3-4) listed eight types of benefits that may be derived through leasing: (1) permissibility (to avoid singing and music), (2) the permissibility of using the benefit in an exchange (to avoid using the contract for sexual services), (3) the significance of the benefit (to avoid worrying about trivial items for which there is no compensation)... the rental of trees to dry clothes was debatable and forbidden by ibn Al-Qāsim, (4) that the property be owned (to avoid renting “properties designated for housing to use as schools), (5) that no non-fungible can be taken (to avoid renting trees for their fruits or a she-animal for her offspring; with the exception of renting a wet-nurse to meet a necessity), (6) that the property is deliverable (to avoid hiring a handicapped person), (7) that the benefit is derived by the lessee (to avoid hiring an individual to perform acts of worship), (8) that the benefit be known (to avoid renting a machine whose use is unknown).

⁴⁰Al-Kāsānī ((Ḥanafī), ibid.).

⁴¹There are a number of *Hadīths* regarding this prohibition. Among them are those narrated by ‘Aḥmad and Muslim on the authority of Jābir (mAbpwh) that the Messenger of Allāh

of sale (of the usufruct), it falls under this prohibition.⁴² If the object of sale is real estate, the same discussion of differing opinions that we covered under defective sales applies.

14.3.9 Conditions that pertain to wages

There are two conditions pertaining to wages:⁴³

1. Wages must be known valued property

Jurists are in consensus regarding this condition. The effects of this condition are well-known as previously detailed under the sale contract. The origin of the condition of knowledge of the rental or wage payment is the *Hadīth*: “Whoever hires an individual must inform him of his wages”. In this regard, knowledge of the wages or rental must be obtained through explicit specification.⁴⁴

For wages or rental payments in goods that are difficult to transport, ’Abū Ḥanīfa ruled that the location of delivery must be specified at the inception of the contract. ’Abū Yūsuf and Muḥammad, on the other hand, ruled that the location need not be explicitly specified, designating the location of the contract session as the default delivery location.⁴⁵

The Ḥanafī condition that the rental or wage payment be known implies that specification of a known portion of the wages plus an unknown portion (e.g. \$100 wages plus the food of a worker or a rented animal), then the lease contract is not permitted. In such cases, the food becomes part of the wages or rental payment, and since its amount is unknown, the overall wages or rental payment are unknown. The Mālikīs, on the other hand, permitted specifying wages or rental payments as food or clothing, since such contracts were commonly in use.⁴⁶

Hiring a wet-nurse

’Abū Yūsuf and Muḥammad, and also Al-Shāfi’ī, ruled that it is not permissible for a person to hire a wet-nurse with her wages being specified as “her food and clothing”, reasoning by analogy since those wages would be unknown. However, ’Abū Ḥanīfa permitted such a contract due to juristic approbation, based on the verse: “If you decide to hire a wet-nurse for your offspring, there is no blame on you, provided that you pay them equitable wages” [2:233]. Thus, Allāh has

(pbuh) said: “If you buy foodstuffs, do not resell them until they are in your possession”, c.f. Al-Shawkānī (, vol.5, p.157). Also, the narrators of the six books with the exception of ibn Mājah narrated on the authority of ibn ‘Abbās narrated as: “Whosoever buys foodstuffs should not sell them before he receives them”, c.f. ’Ibn Al-’Athīr Al-Jazarī (, vol.1, p.383 onwards).

⁴² Al-Kāṣānī ((Hanafi), vol.4, p.193).

⁴³ Al-Kāṣānī ((Hanafi), ibid., pp.193-4).

⁴⁴ ’Ibn Al-Humām ((Hanafi), vol.7, pp.148,178), Al-Kāṣānī ((Hanafi), vol.4, p.193), ’Ibn Qudāmah (, vol.5, p.404).

⁴⁵ Al-Sarakhsī (1st edition (Hanafi), vol.15, p.113).

⁴⁶ ’Ibn Juzayy ((Mālikī), p.274), Al-Dardīr ((Mālikī)B, vol.4, p.31).

negated in this verse any restrictions on the contract of hiring a wet-nurse. This is a special contract in which ignorance of the wages does not lead to dispute, since it is customary to be generous and kind to wet-nurses and they tend in turn to be generous and kind to the offspring. Thus, ignorance in this case is analogous to ignorance of a measure taken out of a heap of food, where it is forgiven since it rarely ever leads to dispute.⁴⁷ The Mālikīs and Ḥanbalīs also ruled with the latter opinion.⁴⁸

Wages that are part of the contract object

The majority of jurists ruled that hiring an individual to perform a job and paying them wages out of their output (e.g. hiring someone to mill wheat and paying him in flour) would render the contract invalid. In such cases, the wages are unknown (e.g. the amount of flour may be unspecified, the quality of the wheat may be unknown, etc.), thus rendering the contract impermissible.⁴⁹ In this regard, jurists cite the Ḥadīth that forbids renting a male animal for mating services or hiring a miller of wheat with wages specified as a measure of flour.⁵⁰

However, the Mālikīs permitted this contract since the wages can be made known.⁵¹ They rebutted the applicability of the Ḥadīth in this case, since the Hadīth mentioned explicitly the measure as a *qafīz*, which is not an accurate measure of the quantity of flour. The Hādawīs, the Zaydī 'Imām Yahyā, Al-Muznī and the Ḥanbalīs agreed with this latter opinion if the measure of flour is specified accurately.

On the other hand, the Mālikīs rendered as defective the contract in which a worker is hired to skin a sheep and collect his wages in skin. In this case, the skin cannot be collected except after the skinning, and it cannot be known whether it will be collected intact or in fragments. In general, they ruled that hiring an individual with an unknown wages (including a grinder of wheat for an unknown measure of flour) would be defective.

Paying a lessor or lessee to vacate the premises

In my opinion, there is no legal prohibition against the lessor-owner collecting a lump-sum from the lessee to vacate the premises. Such a payment is considered a pre-payment of part of the rent as stipulated in the contract. Also, it is permitted to pay a lessee an amount of money to transfer his rights to the usufruct of a property for the remainder of a lease to another. Indeed, the

⁴⁷ Ibn Al-Humām ((Hanafi), vol.7, p.185), Al-Kāsānī ((Hanafi), vol.4, p.193 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.15, p.119), Al-Zaylaī ((Hanafi Jurisprudence), vol.5, p.127).

⁴⁸ Al-Dardīr ((Mālikī)A, vol.4, p.13), Al-Qarāfī ((Mālikī), vol.4, p.4), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.335), Mar'ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.192), 'Ibn Qudāmah (, vol.5, pp.450,453).

⁴⁹ 'Ibn Qudāmah (, vol.5, p.405).

⁵⁰ Narrated by Al-Dāraqutnī and Al-Bayhaqī on the authority of 'Abū Sa'īd, with a weak chain of narration, c.f. Al-Shawkānī (, vol.5, p.292).

⁵¹ 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.222 onwards), Al-Dardīr ((Mālikī)B, vol.4, p.18 onwards).

Shāfi‘īs have ruled in a manner very similar to this in the context of sales: “The contract language may specify a transfer of access to property, and monies may be collected to effect that transfer, in analogy to collecting a sum of money for early retirement from a job”.⁵² All such permissions are legally restricted to the remaining period of a lease, and may not be extended beyond. The lessor’s transfer of the right to the usufruct to another beyond that period must thus be conditioned upon the consent of the owner.

While the Ḥanafis generally find the transfers and sales of pure legal rights (e.g. preemption in a lease contract) impermissible, many Ḥanafis permitted accepting a sum of money to leave a job (such as being the ‘Imām or mu’adhdhin of a Masjid). This opinion was based on convention, and in analogy to the right of a woman to transfer her allotment to another, since this merely involves dropping a right. This opinion may also be reasoned by analogy to the permissibility of an overseer of a religious endowment transferring the right to another at court. In such cases, it has been conventional for the dropping of such rights to be compensated financially.

I have found a more recent Tunisian study labeled *Jumlat Taqārīr wa Fatāwā fī Al-Khuluwwāt wa Al-'Inzālāt* by the Mālikī Muftī 'Ibrāhīm Al-Rayyāḥī (d. 1266 A.H.), Sh. Muhammad Bayram IV, Tunisian Mufti Al-Shādhīlī bin Ṣalīḥ, and Tunisian Justice Muhammad Al-Sūnūsī. Those jurists ruled for the permissibility of collecting financial compensation for vacating premises based on convention, as well as the view that the lessor owns the usufruct, and thus may require a compensation as in a [sub]-lease, or without it as in a loan.⁵³ In this regard, Al-Banānī has narrated that Al-Barzali permitted seeking compensation to vacate a job, and a *fatwā* by the Fās scholars permitting seeking compensation to vacate rented premises. In this regard, Sh. Muhammad Bayram argued that vacating leased premises was similar to vacating leased agricultural lands.

Islamic Fiqh Council ruling #6, 1408 A.H./1988 C.E.

It is worthwhile listing the points made in this ruling, for which I headed the drafting committee:

1. There is no legal restriction against the lessee paying a fixed amount above the regular rental payments (which is called in some countries an evacuation fee or *khuluwwa*), as long as both the lessee and the owner agree to this arrangement. In this case, the payment is considered part of the rental payment for the agreed-upon period of time, and if the contract is later cancelled, this payment inherits the legal status of other rental payments.
2. If the two parties agree, it is permitted during the lease period that the owner pay the lessee an amount of money in exchange for his dropping his established right to the usufruct for the remainder of the period. In this case, the payment is legally permitted since the lessee is thus selling back

⁵² *Hāshiyat Al-Bijirmī* ^calā *Sharh Al-Khaṭīb* (vol.3, p.3).

⁵³ Al-Qarāfi ((Mālikī), vol.1, p.187).

the usufruct to the owner with mutual consent in exchange for the named compensation.

However, if the lease expires, without explicit or implicit renewal (e.g. through automatic renewal implied in the contract language), then such payments are not allowed. In this case, the owner has the primary claim to ownership, and the lessee's right has expired.

3. It is permitted for one lessee to transfer his rights to the usufruct for the remainder of the lease to another lessee, in exchange for an amount of money in excess of the regular rental payment. In this case, all the stipulations in the primary lease contract between the first lessee and the owner must be respected, along with other Legal requirements associated with the lease contract. As in the previous point, if the first lease had expired, then the first lessee's rights would have expired at that time, and collecting an evacuation fee would not be permitted.

Notice that in long-term leasing, some legal systems stipulate that the lessee is not allowed to sub-lease to another, or to collect an evacuation fee, except if the owner consents to that transaction.

2. Rent cannot be a usufruct of the same genus

For instance, it is not permitted to lease a property, with the rent paid by allowing the owner to live on that property, etc. The Ḥanafīs derive this ruling from the prohibition of *ribā*. As we have seen in the chapter on *ribā*, the Ḥanafīs consider unity of the genus together with deferment to be sufficient for *ribā al-nasā'*. In this regard, they view the conclusion of the lease contract to be gradual, as the usufruct is collected. Thus, at the time of collecting the rent, the object of the sale (the usufruct) does not exist, and thus deferment is effected.⁵⁴ On the other hand, we have seen that the Shāfi'īs do not render a contract forbidden based on *ribā* simply based on unity of the genus. Therefore, the Shāfi'īs do not stipulate this condition.

14.3.10 A condition pertaining to the cornerstone of the contract

The lease contract may not contain a condition that is not in accordance with the nature of the contract. For instance, if a person leases his property to another with the condition that he (the owner) lives in it for a month, or if a person rents his riding animal to another with the condition that he (the owner) rides it for a month, etc., the lease is rendered defective. This follows since this type of condition is contrary to the nature of the contract, whereby an additional benefit to one of the contracting parties is stipulated without compensation as a condition. This renders it *ribā* or similar to it, thus rendering the contract

⁵⁴ Al-Kāsānī ((Hanafi), vol.4, p.194).

defective.⁵⁵ On the other hand, the Ḥanbalīs and Mālikīs permitted the lease containing such conditions.

14.4 Conditions of bindingness

There are two main conditions for a lease contract to remain binding:

14.4.1 Leased item must remain free of defects

If a defect that adversely affects the usufruct of the leased object develops,⁵⁶ the lessee has an option to maintain the lease and continue to pay the full rent, or to void the contract.⁵⁷ In this regard, the object of the contract is the usufruct of the leased object, which is collected gradually over time. Thus, when a defect develops in the leased object, the defect would thus have occurred prior to receipt of the usufruct, thus giving the lessee (buyer of the usufruct) an option in analogy to the sale contract.⁵⁸

On the other hand, if the entire leased house were to fall, or if water stops flowing to a water-mill or an agricultural land, then the lease may be voided, since the object of the contract would have perished. However, the majority of Ḥanafīs ruled that the contract is not automatically voided, but that an option is established as a right for the lessee to effect the voiding. Their view is that the object of the contract disappeared in a manner that may be reversed. Thus, they ruled by analogy to the case where an individual buys an animal, but the animal escapes prior to receipt. Moreover, even if the house were to fall, the lessee may still benefit from its land by pitching a tent in place of the house. In this regard, if the defect were removed prior to the lessee's exercise of his right to void the contract (e.g. if the animal is healed, or the house is restored to its original condition), then the option is voided since its reason is no longer present, and the contract continues to be binding.

To exercise his option to void the contract, the defect must be one that materially affects the usufruct of the leased object. Thus, if a wall in a house were to fall without affecting its residents' lives, no voiding option would be established. Moreover, even if the defect is one that materially affects the usufruct of the leased object, the lessee may only void the contract in the lessee's presence. This follows since voiding of a contract requires both parties or agents thereof to be present. An exception to this case is the falling of a house, in which case

⁵⁵ Al-Kāsānī ((Hanafi), vol.4, p.194 onwards).

⁵⁶This includes partial or total loss of usufruct, e.g. complete destruction of an entire house, or a destruction of the roof, c.f. item #514 of *Majallah*.

⁵⁷This applies equally to a rented riding animal that falls sick or gets permanently incapacitated, as well as to a house part of which falls down. This is the opinion of some Ḥanafīs, which is supported in 'Ibn 'Abidīn ((Hanafi)). On the other hand, ibn Al-Shihnah endorsed the apparent ruling that no part of the liability for the rent would be deducted if a house or part thereof were to fall.

⁵⁸ Al-Kāsānī ((Hanafi), ibid, p.195), 'Ibn Al-Humām ((Hanafi), vol.7, p.220), Al-Zayla'ī ((Hanafi Jurisprudence), vol.5, p.143).

the lessee is allowed to leave it, whether or not the lessor is present, thus voiding the contract.

A similar option is established for the lessee if an event takes place in a manner that partitions the initial contract. The partitioning of the contract in this case is determined by the examining the usufruct granted in the initial contract. Thus, if a person leases two houses in one contract, and one of them falls, or if only one house of the two is made available to the lessee, then the lessee has the right to void the contract based on the partitioning of the contract.⁵⁹

14.4.2 Valid excuses to void the contract

In what follows, I shall give a list of the valid excuses that permit the lessee or lessor to void the contract in the different schools. In this regard, the Ḥanafīs permitted certain types of excuses to avoid losses that may befall one party. Therefore, they define a valid “excuse” (*“udhr”*) as a condition that would result in losses to one of the parties of the contract if the contract were to continue, and that cannot be avoided without voiding it. Ibn ‘Ābidīn said: “Every excuse that makes the satisfaction of the contract impossible without causing a harm for the person or property of one of the contract parties gives that party a right to void the contract”.⁶⁰

The majority of other jurists ruled that the lease is as binding as a sale. Thus, the contract may only be voided if a defect is uncovered or if the usufruct of the object ceases to exist. Thus, the Shāfi‘īs said: “A lease cannot be voided based on an excuse such as the lessee’s inability to find fuel for heating bath water, an unanticipated need for the lessee to travel, or sickness of a person who leased a horse for travel and could not travel due to his illness. In all cases, there is no defect in the object of the contract. Thus, voiding of the lease contract requires absence of the usufruct that is the object of the contract (e.g. destruction of a leased house, or death of a leased animal).”

In both cases, voiding of the lease contact can only affect its future, and cannot be exercised retroactively. An exception is the case where the leased object (e.g. an animal) becomes defective (e.g. loses sight or develops a serious disease), in which case the contract is voided from the time of the defect.

Another point of difference between the Ḥanafīs and others over causes for voiding leases is the death of one of the two parties. In this case, the Ḥanafīs ruled that the contract may be voided, while the other schools ruled that it continues. On the other hand, there is a consensus that a lease may not be voided based on a change of ownership of the leased object through sales or gifts.

⁵⁹ Al-Kāsānī ((Hanafi), vol.4, p.196 onwards).

⁶⁰ Ibn ‘Ābidīn ((Hanafi), vol.5, p.55).

Hanafis opinions

The Ḥanafis enumerated three types of excuses that may result in voiding leases:⁶¹

1. **Excuses for the lessee:** Those include bankruptcy, a change of occupation, or travel to another land. In both cases, the lessee would have to endure a significant loss if forced to continue with the lease. As a consequence, all cases where the lessee cannot collect the usufruct of the leased object without incurring a loss would result in voiding the contract. This would include the case where a man hires another to perform a job, and then finds that he decides not to have that job performed. In this case, he cannot be forced to go through with the initial plan that he later recognized would not be beneficial.
2. **Excuses for the lessor:** If prior to commencing the lease, a debt on the lessor is established such that he needs to sell the object of the lease to use its price in repaying the debt, then he may void the lease. In the case where the lessor claims, after the beginning of the lease, that such a debt had occurred prior to the lease, the Ḥanafis have varying opinions. ’Abū Ḥanīfa ruled that the lease may thus be voided (arguing that no person would ever make a false claim about being in debt), while ’Abū Yūsuf and Muḥammad ruled that once the lease had commenced, such a claim cannot be accepted.
3. **Excuses pertaining to the leased object:** An example of this is a case where an individual leases a public bath for a certain period, and then all the potential customers of that public bath desert the city. In this case, the lessee is not required to pay the rent to the lessor. Another example is the case where a person hires a worker to perform a job, but then the worker is legally forbidden from performing this job. Then, the lessee is not obliged to pay the wages for the usufruct that he never extracted.⁶²

⁶¹ Al-Ķasāni ((Hanafi), vol.4, p.197 onwards), Indian Authors ((Hanafi), vol.4, pp.198 onwards, 458-9,463), ’Ibn Al-Humām ((Hanafi), vol.7, p.222 onwards), Al-Ṭahāwī ((Hanafi), p.130), Al-Sarakhsī (1st edition (Hanafi), vol.16, p.2 onwards), Al-Zayla’ī ((Hanafi Jurisprudence), vol.5, p.145 onwards), ’Ibn ʿĀbidīn ((Hanafi), vol.5, p.54 onwards).

⁶² Al-Khatīb Al-Shirbīnī ((Shāfi’ī), vol.2, p. 359).

Shāfi‘ī opinions

The Shāfi‘īs list conditions for the four cornerstones of the lease contract (the two parties, the contract language, the usufruct, and the rent/wages), as detailed below:⁶³

1. Contracting parties’ eligibility

The lessor and lessee must both be of legal age, sane, and free of legal restrictions. This follows since children, insane individuals, and those legally restricted from making financial transactions, do not have the legal right to deal in their person or property.

2. Contract language

Leases require matching offer and acceptance, or conventional language or actions that conventionally signify such offer and acceptance. Also, there should not be a long pause between the matching offer and acceptance, and the two should not be interrupted by the speech of a third-party. Also, the contract must not be suspended pending a condition (e.g. if so-and-so comes, then I leased you my house for so-much).

The author of *Al-Tawṣīḥ* said: “I am not certain whether or not Al-Nawawī would extend his acceptance of hand-to-hand transactions in the sale contract to the case of leases”. The most likely answer is that this ruling cannot be extended, since hand-to-hand transactions are not conventionally used in leasing as they are in sales.

3. Usufruct

- The usufruct of the leased object must be legally considered a good that can be owned, from the Legal and conventional points of view. Thus, it is not permitted to rent gambling machines or dogs (in the majority view). Other rulings under this category render impermissible hiring an individual to advertise an object without undertaking any effort, even if that advertising is effective. Also, it was rendered impermissible to lease gold and silver coins for use as jewelry.
- The usufruct must be deliverable. Thus, it is not permitted to lease a usurped object to any party other than the usurper. Also, it is not permitted to lease agricultural land that does not have a constant source of irrigation, and for which regular rainfall is not sufficient. Similarly, it is not permissible to hire a menstruating or postpartum woman for cleaning mosques.
- The usufruct must benefit the lessee and not the lessor. Thus, it is not permitted to hire an individual to perform acts of worship that cannot be

⁶³Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, pp.332-44).

performed on behalf of another (e.g. prayers and fasting). If the hired person were indeed to perform acts of praying and fasting, the benefit would accrue to him and not to his employer.

- The usufruct must not be a physical identifiable asset (which could be sold separately). Thus, it is not permitted to lease an orchard to collect its fruits, or to lease sheep for their wool and milk.
- The usufruct must be known by characteristics and amount, and identified explicitly by specifying the object from which such usufruct will be extracted. The amount may be specified in units of time (e.g. renting a house), units of work (e.g. sewing a dress), or either (e.g. rent a car by the hour or by distance). In the last case, only one of the two possible specifications of the leased amount may be used (time or distance), but or both. As we have seen previously, specifying both simultaneously results in *gharar*, since the specified distance may be cut in less or more than the specified time.

4. Rental or wage payment

- The rental or wage payment must meet the same conditions as any price in a sale. Thus, the wages or rental payment may not be specified or paid as a dog or pig, or other impure objects.
- It must be a good. Thus, insects may not be used as a wage or rental payment due to their insignificance, vicious animals may not be used due to their danger, and gambling machines and statues may not be used due to their illegality.
- It must be deliverable. Thus, rental and wage payment may not be specified as birds in the sky or fish in the sea. Also, they may not be specified in terms of usurped objects unless the lessor is the usurper or one who has the ability to take it from him.
- It must be known to both parties. Thus, it is not permitted to lease a car in exchange for the fuel in its tank, or animal in exchange for its feed, since those amounts are unknown. Similarly, a farmer may not be paid by part of what he sows, the collectors of charitable contributions to Islamic centers may not be paid wages as a percentage of what they collect, and real estate agents may not be paid a percentage of the price they get the seller. In the case of collectors of charitable payments, they cannot in general be correctly classified as *al-`āmilīna `alayhā* [a category of individuals who are eligible for charities as per the Qur'anic verse 9:60]. In many cases, they are collecting monies that are not intended for them, and they should only collect the costs of their travel.

Chapter 15

Characteristics and Legal Status

15.1 Characteristics of leases

The Ḥanafīs consider the lease a binding contract, which - as we have seen - may not be voided unless there is a valid excuse. This follows from the verse [5:1] in which Allāh (swt) issues the injunction "fulfill your contracts", where voiding a contract is clearly distinguished from fulfilling it.¹

The majority of jurists ruled that the lease is a binding contract that can only be voided based on the existence of an eligible defect or if the usufruct of the leased object ceases to exist. Their ruling is based on the same verse [5:1]. The subject of the lease contract is a usufruct, which makes it similar to marriage, and it is a financial commutative contract, which renders it similar to sales. Those similarities greatly limit the potential for its voiding.²

As a result of this juristic difference, the Ḥanafīs ruled that a lease would be voided following the death of one of the lessor or lessee. They base this opinion on the fact that continuation of the contract would mean that either the usufruct or the rental becomes owned by a party other than the one who concluded the contract, which is not permissible. In their view, the lease contract is continuously concluded for the collection of temporal usufruct. Thus, transferring the ownership of the usufruct or the rental to an heir would constitute inheritance of that which the deceased had not [yet] owned. On the other hand, the right to the property of the heir cannot be justified since the heir never signed the contract.³ On the other hand, the majority of Mālikīs, Shāfi‘īs

¹ Al-Kāsānī ((Ḥanafī), vol.4, p.201), Al-Sarakhsī (1st edition (Ḥanafī), vol.16,p.2).

² Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.227), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.355), Ibn Qudāmah (, vol.5, pp.409,411), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.209).

³ Ibn Al-Humām ((Ḥanafī), vol.7, p.220), Al-Kāsānī ((Ḥanafī), vol.4, p.222), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.1444), Al-Samarqandī ((Ḥanafī), p.128), Ibn ‘Abidīn ((Ḥanafī), vol.5, p.57).

and Hanbalīs ruled that the lease contract is not voided based on the death of one of its parties. They base their opinion on the view that lease is a binding commutative financial contract, which is thus not voided by death in analogy to the sales contract.⁴

15.1.1 Options in lease contracts

In the lease of a non-fungible identified object, the defect option is established. Thus, if a well in leased agricultural land runs dry, or if the wheels of a leased car do not rotate, the lessee has the option to void the contract.

On the other hand, the defect option cannot be established in the lease of fungibles. In this case, the lessor is responsible to replace the leased object. Moreover, the contract session and condition options cannot be established in a lease contract. This follows since leasing is one of the *gharar* contracts, and options involve *gharar*. In this regard, it is not permitted to add *gharar* on top of *gharar* [thus rendering it substantial].

15.2 Legal status of leases

A valid lease transfers ownership of the usufruct to the lessee, and ownership of the rental to the lessor. In this regard, it is a commutative financial contract, where the object of sale is the usufruct.⁵

If the lessee extracts the usufruct in a lease contract that is rendered defective because of a defective condition, he is responsible to pay the minimum of the named rent in the contract and the going market rental price for similar objects. On the other hand, if the lease is defective due to ignorance of the object of sale or due to not naming it, the lessee is obliged to pay the named rent.⁶ On the other hand, Zufar, Mālik, and Al-Shāfi‘ī ruled that the lessee in a defective lease is required to pay the going market rent for similar objects, whatever that rent maybe. They ruled thus based on the view that once a sale is rendered defective, the buyer is required to pay the value to the seller, whatever that value may be.⁷

⁴Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.238), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.356), Ibn Qudāmah (, vol.5, p.428).

⁵Al-Kāsānī ((Hanafi), vol.4, p.201).

⁶Al-Kāsānī ((Hanafi), vol.4, p.195), Ibn Al-Humām ((Hanafi), vol.7, p.174 onwards), Al-Zayla‘ī ((Hanafi Jurisprudence), vol.5, p.121), Ibn ‘Abidīn ((Hanafi), vol.5, p.31), Khusrū (1304H (Hanafi), vol.2, p.231). The reason for differentiating between sales and leases in the case of a forbidden defective condition is this: the object of a sale has an independent value, and thus the buyer is responsible to compensate the seller for that value. On the other hand, the Hanafis do not consider that usufruct has an inherent value, and its value is derived from the contract. Thus, the value in this defective lease is determined by comparison to other leases, provided that it does not exceed what the lessor and lessee agreed upon in the defective contract, c.f. Al-Kāsānī ((Hanafi), vol.4, p.218).

⁷Al-Kāsānī ((Hanafi), ibid.), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.358).

Chapter 16

Two Types of Leasing

The Arabic term *'ijārah* (translated here as “lease”) covers two types of contracts: (1) leasing an object for its usufruct, and (2) hiring workers for their labor.

16.1 Leases for usufruct

This category includes traditional leasing of homes, stores, riding animals, clothes and jewelry, etc. It is permissible for permissible usufruct, to the exclusion of impermissible usufruct. Thus, there is a consensus among jurists that it is impermissible to collect rent for leasing objects for impermissible usufruct, in analogy to the impermissibility of collecting a price for dead animals and other non-goods.

The Ḥanafīs and Mālikīs deem that the legal status of the lease contract evolves gradually over time as the object of the contract - the usufruct - is derived.¹ In contrast, the Shāfi'īs and Ḥambalīs deem the legal status of the lease contract to be established immediately, with the period of the lease considered the lifetime of a specified non-fungible object.²

This difference in juristic opinion leads to a number of different juristic details:

16.1.1 Establishment of ownership of the rent

The Shāfi'īs and Ḥambalīs render the lease a financial commutative contract. Thus, the lessor's ownership of the rent is established immediately at the conclusion of the contract, in analogy to a seller's ownership of the price in a sale contract.

¹ Al-Kāṣānī ((Hanafi), vol.4, p.201), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.226), Al-Dardīr ((Mālikī) A, vol.4, p.4), 'Ibn Juzayy ((Mālikī), p.275).

² 'Ibn Qudāmah (, vol.5, p.406), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.334), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.399), Al-Sha'arānī ((Shāfi'ī), vol.2, p.94), Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.116).

In contrast, the Ḥanafīs and Mālikīs ruled that the rent is not owned by virtue of the lease contract itself. Instead, they argue that ownership of the rent is established gradually in relation to the derived usufruct. Hence, the lessor does not have the right to demand the rent except day-to-day. Their logic is that in this unconditional financial commutative contract, equity dictates that ownership of one of the compensation (the rent) cannot be established except as ownership of the other compensation (the usufruct) is established to the other party.

However, the Ḥanafīs and Mālikīs allow the rent to become the property of the lessor in one of three cases:

1. That prepayment of the rent is stipulated in the lease contract.
2. If the lessee prepays unconditionally. In this regard, paying the rent later is a right for the lessee, but he can prepay it in the same sense he can prepay a deferred liability.
3. As the lessee derives usufruct gradually, the rent gradually becomes the property of the lessor. Alternatively, if the lessor gives complete access to the leased object, the lessee may be viewed to be in possession of his compensation, and the rent becomes property of the lessor.

The two parties may agree to defer the rental payments, in analogy to deferment of price payment in a sale. However if the parties to the lease contract do not explicitly state when the rent is due, 'Abū Ḥanīfa was reported to have ruled in two different manners. His earlier ruling, which was upheld by Zufar, is that the rent becomes due at the end of the rental period. This opinion is based on the idea that until all of the usufruct is extracted, none of its compensation is due. The later and better supported opinion of 'Abū Ḥanīfa, which was upheld by 'Abū Yūsuf and Muḥammad, is that the rent is due sequentially. Thus, the lessee should pay the lessor day-to-day as he collects the usufruct. Under this ruling, the gradual extraction of the usufruct matches the gradual accrual of the rent.³ Taken literally, this rule would require continuous payment of rent, thus requiring the specification of a reasonable unit of time for rent collection (e.g. day, week, month, etc.) was required by juristic approbation.

The Shāfi'īs and Ḥanbalīs ruled differently regarding the time of accrual of rent depending on whether the leased object is fungible or non-fungible. If it is fungible (e.g. you lease me a camel with certain characteristics to carry my luggage), they ruled that the rent (if itself fungible, e.g. money) should be delivered during the contract session, since it is thus equivalent to the price in a *salam* contract. Since the rented object is fungible and collected with deferment, and since the rent is fungible, deferment of the rent would effect trading debts for debts, which is forbidden *ribā*.

If the leased object is non-fungible, then if the rent is also non-fungible, it cannot be deferred. However, if the leased object is non-fungible, and the rent

³Al-Kāṣānī ((Ḥanafī), vol.4, p.201 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.152 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.15, p.108), Al-Zaylaғī ((Ḥanafī Jurisprudence), vol.5, p.109), 'Ibn Juzayy ((Mālikī), p.275), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.226).

is fungible (e.g. money), then both deferment and immediate payment of the rent are permitted. This follows in analogy to the sale contract, where the price may be paid immediately or deferred.⁴

16.1.2 Delivery of the leased object

The Ḥanafīs and Mālikīs ruled that the leased object must be delivered immediately following the conclusion of the contract. This follows from the lessee's established ownership of the usufruct, while the rent is not yet the property of the lessor. Thus, the lessor may not withhold the leased object until he collects the rent. Instead, the lessor must deliver the leased object immediately to the lessee, and then demand the rent periodically as the lessee extracts usufruct from the object. The difference between this case and the case of the sale contract, where they would rule that the price should be delivered, is that the object of this contract (the usufruct) is non-existent at the time of the contract, and thus the rent does not accrue to the lessor until later.

16.1.3 Deferred leasing

Another interesting implication of the above mentioned juristic differences is that the Ḥanafīs, Mālikīs, and Ḥanbalīs permit deferred leasing (where the contracts states the future date at which the lease will commence). This follows from their consideration that the lease contract is concluded gradually as the object of the contract comes into existence. Thus, deferment is implicit in the contract in any case, out of necessity.⁵

- The Ḥanafīs concluded from this ruling that if the lessor were to sell a leased house, the right of the lessee remains intact, even if the sale were to occur prior to the commencement of the deferred lease.
- The Ḥanbalīs agreed with the Ḥanafīs and Mālikīs on the permissibility of deferred leasing based on the view that the future lease could be contracted upon in conjunction with other things (e.g. a one-month lease starting next month can be conjoined into a two month lease starting today). Thus, they argued, it can be contracted upon by itself. The deliverability condition in this case is relevant only for the time at which delivery needs to be made, in analogy to the object of *salam*.
- The Shāfi'īs, on the other hand, ruled that it is not permissible to sell the future usufruct of a non-fungible in a lease contract except as part of a lease that begins at the contract time. They argued that the contract, as a sale of non-fungible usufruct, may not be deferred to avoid selling an item

⁴ Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.334), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.399), 'Ibn Qudāmah (, vol.5, p.408).

⁵ Al-Kāsānī ((Ḥanafī), vol.4, p.203), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.148), 'Ibn Ābidīn ((Ḥanafī), vol.5, p.4), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2., p.224), 'Ibn Qudāmah (, vol.5, p.400), 'Ibn Juzayy ((Mālikī), p.276).

that is yet to exist. This is in contrast to the case of leasing fungibles, where the fungible usufruct may be sold with deferment through a deferred lease.⁶

16.1.4 Miscellaneous other issues

There are a number of other issues related to the legal status of usufruct leasing:

Means of extracting usufruct

An individual who leases a house or store may use it as he wishes in the normal manner of usage, use it to house others through sub-leasing or lending, or use it to store furniture. On the other hand, any use that may harm the property in the short or long run (e.g. through the use of heavy machinery or fire), would not be permitted. This follows from the notion that the lease contract is primarily a sale of the usufruct, which does not allow the buyer of the usufruct to consume the actual leased asset by causing unusual depreciation through unconventional usage (e.g. as a factory rather than a house). As for subleasing or lending the usufruct, that becomes the right of the lessee based on his ownership of that usufruct.

Leasing of land

When land is leased, the allowable uses of the land under the contract must be specified (e.g. for agricultural use, for building, etc.). Without specification of the uses for which the land is leased, the contract is rendered defective. Moreover, the specification must be detailed, e.g. stating precisely what will be planted in land leased for agricultural use, etc. This follows, since the different uses of land (including the crop grown on it, or the type of building erected there) affect it differently.

Leasing of riding animals

When leasing a riding animal, either the time of the lease or the distance to be traveled must be specified, otherwise the lease is defective. Moreover, the precise usage of the animal (transporting people vs. transporting luggage, and characteristics of the passengers or cargo) must be specified. In this regard, the different uses of the animal clearly affect it differently, thus requiring statement of the use in detail to avoid later disputation.

As we have seen previously, if the lessee extracts usufruct from the object of a defective lease, he is responsible to pay the going market rental rate for similar leased objects. This is the ruling based on reasoning by analogy. On the other hand, we have seen that juristic approbation would require paying the

⁶Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.338), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.396).

named rent, since the potential cause for disputation is ignorance, which would have been removed by the conclusion and execution of the contract.⁷

Repairs of the leased item

An important issue for leases is responsibility for regular maintenance and repairs. For instance, who would be responsible for clearing plugged drainage, or repainting walls, etc.?

The Hanafis ruled in general that the lessor-owner of a leased house has the sole responsibility to make all necessary repairs to ensure that the house is in good living condition, even if the problem (e.g. a plugged drainage) was caused by the lessee. This ruling is based on the view that all repairs are the responsibility of the owner of the item. However, they ruled, the owner cannot be forced to make the necessary repairs in his own property. Thus, if there are problems that require repair to restore the house to livable condition, the lessee is given an option to void the contract.

On the other hand, they ruled that the lessee is responsible to clean the house he leased before delivering it to the lessor. Also, they ruled that if the lessor clears a blocked drainage, the lessee would be held responsible to transport whatever blocked it, in analogy to his responsibility to cleaning the house after himself. However, since it is customary for the one who does the clearing of drainage to do the transportation of the blocking material, they ruled by juristic approbation that it was reasonable to let the lessor-owner do the transportation as well as the clearing.

If the lessee in fact performs one of those acts of maintenance and repair for which the lessor is responsible, then we consider two cases. If he volunteers to perform the repairs, then he would not be compensated for it. However, if the owner or his agent were to ask him to perform the repairs, then he should be compensated accordingly.⁸

Lessee responsibilities at the conclusion of a lease

There are a number of responsibilities for the lessee at the conclusion of the lease, of which we mention the two most important:⁹

1. The lessee is responsible for the delivery of the keys to the leased house or store to the lessor after the conclusion of the lease.
2. If a person leases a riding animal for transportation from a designated place to another, he is responsible to deliver the animal back to where he received it. This requirement is not related to providing the sustenance of the animal through its return journey. Rather, the requirement is made

⁷Ibn Al-Humām ((Hanafi), vol.7, p.166 onwards), Al-Kāsānī ((Hanafi), vol.4, pp.183,207), Al-Zayla‘ī ((Hanafi Jurisprudence), vol.5, p.,113 onwards), 'Ibn 'Ābidīn ((Hanafi), vol.5, pp.19,55).

⁸Al-Kāsānī ((Hanafi), vol.4, p.208 onwards).

⁹Al-Kāsānī ((Hanafi), vol.4, p.209).

necessary by the fact that the lease contract does not end until the animal is returned to its original location. Thus, if the lessee leaves the animal at a different location (e.g. his house), he is responsible for it. Thus, if the animal later becomes incapacitated, he would be required to pay its value to the lessor, since he was required to return it to the contract location earlier. On the other hand, if the lessor were to ask the lessee to ride the animal from one point to another, and then to deliver it to his (the lessor's) house, the lessee is not bound to do so. In this regard, by returning the animal to the contract location, the lessee would have satisfied his responsibility, and the animal remains with him as a trust, which he is not obliged to deliver to depositor.

Similarly, if the lease was constructed on the basis of time rather than distance, the lessee is not responsible for delivering the animal to the lessor. In this case, the usufruct defined as the time of usage was paid for, and if the lessee keeps the animal any longer than the lease time, it is considered a trust with him. In this case, even if the animal were to perish prior to the lessor's collection, the lessee is not required to compensate the lessor for it. This is contrasted with the cases of a borrower (who continues to use the animal) or a usurper (who has no right to possess the animal), who would be responsible for compensation.

16.2 Legal status of hiring workers

A hired worker is one who is paid a known wage for a known job (e.g. building a house, sewing a shirt, etc.). In this regard, there are two types of hired workers:

1. Exclusively hired workers work for a single individual for a known time period. Such workers may not work at the same time for any party other than his employer.
2. Non-exclusively hired Workers simultaneously work for multiple individuals on a per-task basis (e.g. professional cleaners, shoe repair shopkeepers, etc.). When such an individual is hired for a task, the customer does not have the right to forbid him from working for others at any given time.¹⁰

In this classification, a wet-nurse is considered an exclusively hired worker, who is not allowed to nurse another infant while employed to hire the first. If she does indeed nurse another at the same time, there are a variety of opinions. Thus, if by doing so, she harms the infant whom she was hired to nurse, then she is considered a sinner. However, since she would have fulfilled the general requirement of nursing the first infant, a ruling by juristic approbation suggests that she would deserve compensation for nursing both children [provided that the first one is not harmed by this action?]. The ruling by analogy suggests that even if she nurses two infants when hired to nurse only one, she only deserves

¹⁰Al-Kāsānī ((Hanafi), vol.4, p.174), 'Ibn Al-Humām ((Hanafi), vol.7, p.200), Al-Zayla'ī ((Hanafi Jurisprudence), vol.5, p.133 onwards), 'Ibn Juzayy ((Mālikī), p.336).

wages for nursing the one whom she was hired to nurse. Also, jurists ruled that the wet-nurse's duties may include taking care of the infant (e.g. changing and cleaning it, etc.) in manners that are customary in her society.¹¹

16.3 The Shāfi‘ī classification of leases

The Shāfi‘īs classify leases into two categories:

- **Lease of a non-fungible** would entail derivation of usufruct from that specific item (e.g. a particular house or car). The Shāfi‘īs postulate three conditions for his type of lease:
 1. The leased object must be known and clearly specified (thus, it is not permissible to “lease one of those two houses”),
 2. The leased object must be observable to both the lessor and the lessee, unless the object had been inspected shortly prior to the contract, and
 3. Such leases cannot commence at a future date (thus, it is not permissible for them to lease a specific house starting next year).
- **Lease of a fungible** would entail the derivation of usufruct that is considered a liability on the lessor. This applies to cases such as leasing a riding animal or car with stated characteristics (e.g. model and year) for a specific trip or time period. It also applies to hiring an individual for performing a specific job (e.g. sew a dress). There are two conditions associated with this type of lease:
 1. The rent or wages must be paid in full during the contract session. This follows since the Shāfi‘īs consider this contract a *salam* sale of the usufruct, which requires full prepayment of the price.
 2. The stated characteristics of the leased item must specify its genus, type, and characteristics (e.g. a car of specific make, model, and year).

¹¹ Al-Kāsānī ((Hanafi), vol.4, p.209), Al-Zayla‘ī ((Hanafi Jurisprudence), vol.5, p.129).

Chapter 17

Guarantees In Leasing

In what follows, we discuss both the hired worker's guarantee of the material on which he works, and the guarantee of a lessee of the object he leased.

17.1 Guarantee of leased items

The lessee is legally entrusted with the leased item from which he derives usufruct. Hence, he is only responsible for defects in the leased object that are caused by negligence or transgression. On the other hand, his only rights to the leased objects are tied to the usufruct mentioned in the contract or conventionally considered to be part of the lease.

17.2 Hired worker s guarantee of work materials

As we have seen in the previous chapter, we need to consider two types of hired workers: those who are hired to work exclusively for a particular individual, and those who can work simultaneously and non-exclusively for multiple individuals.

17.2.1 Exclusively hired worker

The four leaders of the Sunni schools of jurisprudence agreed that this type of worker is not responsible for the object used in his work (e.g. house, shop, or work material) unless a defect is caused by his negligence or abuse. This ruling applies universally whether the defect were to occur while he is working or simply while holding the assets as a trust.

17.2.2 Non-exclusively hired workers

Jurists differed over the responsibility of this type of worker for materials entrusted to him to perform a certain job. 'Abū Ḥanīfa, Zufar, Al-Ḥasan ibn Ziyād, Al-Shāfi'ī (in the better of his two reported opinions), and most of the

Hanbalīs ruled that this worker's possession of the materials are possessions of trust. Thus, the rule pertaining to his responsibility for those materials is identical to that for the exclusively hired worker, whereby he is only responsible for what becomes defective due to his negligence or abuse. In this regard, they ruled that this is the default ruling, whereby responsibility for compensation is only effected through transgression: "Let there be no hostility except to those who transgress" [2:193].¹

On the other hand, 'Abū Yūsuf, Muḥammad, and 'Ahmad in another reported opinion, ruled that the possession of a non-exclusively hired worker implies guarantee of what is in his possession. Thus, even if the materials were to perish without any transgression or negligence, he would be responsible for it. The only exception to this rule in their opinion is if the destruction is caused by a general disaster such as a major fire or flooding. Their proof for this opinion relied on the actions of ^cUmar and ^cAlī (mAbpwt) that we shall discuss shortly.² Al-Baghdādī said that 'Abū Yūsuf and Muḥammad ruled thus (in contradiction to the opinion of 'Abū Ḥanīfa) due to the change of times, and to protect people's properties.³

The Mālikīs ruled that the non-exclusively hired worker guarantees the assets that they affect through their labor. This applies to assets that are not under the supervision or observation of their owners, regardless of whether or not the defect was caused by negligence or transgression. Thus, the cook guarantees any foods he spoils, the dressmaker guarantees any ruined cloth, etc.⁴

The Mālikī proof for this opinion is the Hadīth: "Every person is responsible for what he took until he delivers it back to its owner".⁵ They also relied on the narration that ^cAlī (mAbpwh) held the one who dies clothes and leather, and the jewelers, responsible for the properties of their customers saying: "Only this approach will keep people honest". It was also narrated that ^cUmar (mAbpwh)

¹ Al-Ṭahāwī ((Hanafī), p.129), Indian Authors ((Hanafī), vol.4, p.486), Al-Zayla^cī ((Hanafī Jurisprudence), vol.5, pp.110,134), Al-Kāṣānī ((Hanafī), vol.4, p.211), 'Ibn Al-Humām ((Hanafī), vol.7, p.207), Al-Sarakhsī (1st edition (Hanafī), vol.15, p.103), Majma^c Al-Damānāt (p.27), Al-Dardīr ((Mālikī)A, vol.4, p.28), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.4, p.28), Al-Khaṭīb Al-Shirbīnī ((Shāfi^cī), vol.2, p.351), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi^cī), vol.1, p.408), 'Ibn Qudāmah (, vol.5, pp.479,487), 'Ibn Juzayy ((Mālikī), pp.276,336), Rasā'il 'Ibn ^cĀbidīn 9vol.2, p.178).

² Al-Kāṣānī ((Hanafī), vol.4, p.210), 'Ibn Al-Humām ((Hanafī), vol.7, p.201), Al-Ṭahāwī ((Hanafī), ibid.), Al-Sarakhsī (1st edition (Hanafī), ibid.), Al-Khaṭīb Al-Shirbīnī ((Shāfi^cī), vol.2, p.351), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi^cī), ibid.), 'Ibn Qudāmah (, vol.5, p.487), 'Ibn Juzayy ((Mālikī), ibid.), Mar^c ibn Yūsuf (1st printing (Hanbalī), vol.2, p.213 onwards).

³ Majma^c Al-Damānāt (p.27).

⁴ 'Ibn Juzayy explained that the workers are responsible for items left with them (without supervision or observation by the owners), regardless whether or not they collect wages for their labor. On the other hand, if the item is under the constant observation of the owner, then the hired worker is not responsible for it. This, he argued, was the most widely accepted Mālikī view, c.f. Al-Dardīr ((Mālikī)B, vol.4, p.47).

⁵ Narrated by 'Ahmad and the authors of the four *Sunan*, and rendered valid by Al-Ḥākim, on the authority of Samurah ibn Jundub. It was also narrated by Al-Ṭabarānī, Al-Ḥākim, and Ibn 'Abī Shaybah, c.f. 'Ibn Al-Āthīr Al-Jazarī (, vol.9, p.110), Al-Ḥafiz Al-Zayla^cī (1st edition, (Hadīth), vol.4, p.167), 'Ibn Hajar (, p.253), Al-Sakhawī (, p.290), Al-Shawkānī (, vol.5, p.298), Al-San^cānī (2nd printing, vol.2, p.67).

used to hold non-exclusively hired workers responsible for their customers' properties in the interest of protecting the latter.⁶

The Mālikīs also reasoned in favor of this opinion by the fact that the joint worker receives the customers' properties to use for his benefit, thus inheriting the legal status of the borrower of such properties.⁷ Similarly, 'Imām Mālik ruled that a hired worker who carries food that he may desire guarantees the safety of the food, to avoid potential abuses of his access to it.

17.2.3 Converting possession from trust to guarantee

As we have seen, most jurists consider materials in the possession of a worker to be a trust. However, we have seen that if a defect were to occur in the materials due to the worker's negligence or abuse, then he is responsible for the defect. Different jurists treated inadvertent mistakes differently. They all agree that exclusively hired workers are not responsible for the negative effects of inadvertent mistakes. On the other hand, 'Abū Ḥanīfa, 'Abū Yūsuf and Muhammad ruled that the non-exclusively hired worker is responsible for inadvertent mistakes, since they are hired for constructive and not destructive effort. However, Zufar and the Shāfi'iis ruled that the hired worker is not responsible for any inadvertent mistakes. Their proof is that the worker was hired for his labor in general, and inadvertent mistakes in the absence of negligence are - by definition - virtually impossible to avoid. In this regard, they argued that the worker should not be held to very difficult and unrealistic standards.⁸

Apprentice mistakes

If the apprentice of a hired worker causes a mistake for which compensation is required, then his master is considered responsible for compensation. This applies to all out-of-the-ordinary mistakes perpetrated by the apprentice and causing a defect. On the other hand, if the worker has a trust in his store, and the apprentice causes a defect that is unrelated to his work and training, then the apprentice is the one responsible for the damage.⁹

⁶The Hadith of ^cUmar was narrated by ^cAbd Al-Razzāq with a broken chain of narration. The Hadith of ^cAlī was narrated by Al-Shāfi'i with a weak chain of narrations, and there were other weak narrations that would not be accepted by the people of ḥadīth, c.f. Al-Bayhaqī's *Sunan* (vol.6, p.122), *Kanz Al-^cUmmāl* (vol.2, p.191).

⁷Ibn Rushd Al-Hafid ((Mālikī), vol.2, pp.229,230), Al-Dardīr ((Mālikī)A, vol.4, p.27), 'Ibn Qudāmah (, vol.5, p.479), 'Ibn Juzayy ((Mālikī), p.336), Al-Qarāfī ((Mālikī), vol.2, p.207; vol.4, pp.11,27).

⁸Al-Kāṣānī ((Hanafi), vol.4, p.211), 'Ibn Al-Humām ((Hanafi), vol.7, p.201), Al-Tahāwī ((Hanafi), p.130), Al-Zayla^cī ((Hanafi Jurisprudence), vol.5, p.135), 'Ibn ^cĀbidīn ((Hanafi), vol.5, p.46), Al-Sarakhsī (1st edition (Hanafi), vol.15, pp.104,161), *Majma^c Al-Ḍamānāt* (pp.28 onwards, 41-49), Al-Khatīb Al-Shirbīnī ((Shāfi'i), vol.2, p.351).

⁹*Majma^c Al-Ḍamānāt* (pp.28 onwards, 41-49).

Blood-letting and circumcision

Due to the special nature of those tasks, if the person hired for those medicinal procedures causes a loss or death, he is not considered a guarantor. This follows from the fact that it is very difficult to guarantee complete safety in those jobs.¹⁰

17.3 Violation of lease conditions

If one or more of the explicit or implicit conventional conditions of lease or hiring contract are violated, then the lessee guarantees the leased property. Such violations may pertain to the genus, amount, characteristics, space, or time of the derivation of usufruct or work of a hired person.

17.3.1 Leased riding animals

If the lessee of an animal violates the conditions of the lease by making it carry loads different from what was stated in the contract, we consider two cases:¹¹

1. If the animal was used to carry a load of equal or lighter weight than what was specified, then the lessee is not responsible for the possibility of the animal's death. However, if the load was heavier than agreed, and of different genus, then the lessee is responsible for what happens to the animal. In this case, the lessee is responsible to compensate the lessor for the animal's value if anything were to happen to it, but does not pay the rent. In this regard, the lessee is considered a usurper, who does not pay rent. In general, the status of the lessee cannot be such that he guarantees the property and pays rent at the same time.¹²

On the other hand, if the animal is used to carry a heavier load (for example, and eleven pounds load instead of a ten pound load) than agreed upon, but of the same genus, then: if the animal arrives safely, the lessee is required to pay the rent, with no guarantee or compensation. However, if the animal dies, then he pays the full rent plus a penalty proportional to the increment (e.g. one-eleventh of the value of the animal in the current example). In the latter case, the load is only partially responsible for the animal's death, and the rule is to divide the lost value into equal parts (eleven in our example), and penalty is paid in proportion to the unauthorized part.

2. Alternatively, if the animal is used to carry a load of the same weight, but of different genus (e.g. a ton of iron instead of a ton of cotton), then

¹⁰ 'Ibn Al-Humām ((Hanafi), vol.7, p.206), Al-Sarakhsī (1st edition (Hanafi), vol.15, p.104), Al-Zayla^{cī} ((Hanafi Jurisprudence), vol.5, p.137), 'Ibn Ḥāfiẓ Abidīn ((Hanafi), vol.5, p.47), *Majma' Al-Damānat* (p.47).

¹¹ Al-Kāsānī ((Hanafi), vol.4, p.213 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.15, p.170 onwards), Al-Zayla^{cī} ((Hanafi Jurisprudence), vol.5, p.118 onwards), 'Ibn Al-Humām ((Hanafi), vol.7, p.170 onwards), 'Ibn Ḥāfiẓ Abidīn ((Hanafi), vol.5, p.25).

¹² Al-Sarakhsī (1st edition (Hanafi), vol.15, p.147).

if the animal dies, the lessee must pay compensation for its value and pays no rent. In this case, the densities of different materials may differ, and therefore the strain on the animal may still be substantially different for loads of equal weight. Thus, the lessee is considered a usurper, who guarantees the animal but pays no rent. In this regard, if the animal was leased for riding, different riders of the same weight would be considered equivalent to loads of different genera since their riding styles may differ substantially.¹³

3. If the violation of the lease pertains to location (e.g. the animal was taken further than the agreed distance), then the lessee guarantees the full value of the animal.¹⁴
4. If the violation is temporal (e.g. the animal was used beyond the agreed-upon lease period), then the lessee is considered a usurper, and he guarantees the full value of the animal.

17.3.2 Non-exclusively hired workers

In this case, we consider violations of the lease conditions as they pertain to the genus and characteristics of the job, or to quantity:¹⁵

- If the hired worker delivers a product of different genus (e.g. a red dress instead of a green one, or producing a dress with a different shade of green), then the employer has the option either: (i) to demand compensation for the value of the raw material, or (ii) to accept the delivered product and pay the wages for producing a similar one.
- The difference between the delivered product and the one on which the contract was drawn could be more quantitative. For instance, a tailor may produce a dress of different thickness from the one upon which the contract was written. If the delivered product is superior to the one described in the contract, the customer has the option of demanding compensation for the value of the raw material, or accept the product and pays the agreed-upon wages. On the other hand, if the product is of lower quality, there are two reported opinions. One reported in *Al-'Asl* suggests that the customer should accept the product and pay properly discounted wages, while the other opinion suggests that the customer should receive compensation for the value of the raw material.

17.3.3 If the product perishes

As we have seen previously, the majority of jurists agree that the Non-exclusively hired worker does not guarantee the goods left with him except against his own

¹³Tr: Many details are given here by the author regarding different treatments of the animal and different types of saddles.

¹⁴Al-Tahāwī ((Hanafi), p.128).

¹⁵Al-Kāsānī ((Hanafi), vol.4, p.216 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.15, p.106), 'Ibū Al-Humām ((Hanafi), vol.7, p.170), *Majma' Al-Damānat* (p.45 onwards).

negligence or abuse. Their argument was based on the view that the goods were left as a trust with the worker. We have also seen that the Mālikīs, 'Abū Yūsuf, and Muhammad ruled that the non-exclusively hired worker thus guarantees the goods against all defects and destruction.¹⁶ Finally, we have shown that jurists were in agreement that the lessee is considered a trustee for the leased object, and therefore is only responsible for defects or destruction caused by his own abuse. Their logic relies on the view that the lessee is in possession of the leased item to derive usufruct, and the object itself is viewed as a trust.¹⁷

Given the difference in opinion in the case of the non-exclusively hired worker, it may be asked whether the hired worker in this case would still deserve his wages if the object of his work were to perish. The schools have differed in this regard:

- The Shāfi'īs ruled that if the hired worker works inside the property of the customer or in his presence, then he deserves the wages, since he was supervised by the one who hired him. In this regard, they ruled that as he finished parts of the work, he was considered to have implicitly delivered part of the work, for which he deserves the wages. On the other hand, if he worked away from the customer, then he would not have delivered the work, and he would deserve no wages.¹⁸ The Ḥanbalīs ruled the same way.¹⁹
- The Ḥanafī ruling was similar to the Shāfi'īs and Ḥanbalīs, with a more detailed distinctions within the cases of working under the supervision of the customer or away from him:²⁰

If the worker works away from the customer:

- If the work affects the goods in an observable manner (e.g. sewing a dress), then the wages accrue as the desired change in the goods is delivered. However, if the object were to perish prior to delivery, then the worker does not deserve any wages, since the compensation for that wage (as in a sale contract) would cease to exist.
- If the work does not affect the goods themselves in any observable manner (e.g. carrying objects), then the wages accrue immediately following the conclusion of the work, even if the goods were not yet delivered to the owner. In this case, the wages are considered a compensation for the work. Since the work would have been done in this case, the wages are due to the worker whether or not the objects perish.

¹⁶ Al-Sha'arānī ((Shāfi'ī), vol.2, p.95), 'Ibn Qudāmah (, vol.5, p.487).

¹⁷ 'Ibn Qudāmah (, vol.5, p.488), Al-Kāsānī ((Hanafī), vol.4, p.210), Jāmi' Al-Fuṣūlayn (vol.2, p.163), 'Ibn Juzayy ((Mālikī), p.287), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.408).

¹⁸ 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.409).

¹⁹ 'Ibn Qudāmah (, vol.5, p.487).

²⁰ Al-Kāsānī ((Hanafī), vol.4, p.204 onwards), Al-Zayla'ī ((Hanafī Jurisprudence), vol.5, p.109), 'Ibn 'Abidīn ((Hanafī), vol.5, p.12).

- In the former case, the hired worker has the right to withhold the product until he collects his wages, since the two compensations should be exchanged simultaneously. On the other hand, the worker does not have the right to withhold the goods in the latter case, and if the object were to perish, he would be responsible to compensate the owner for it.

On the other hand, if the worker works under the supervision of the owner:

- The worker deserves his wages for the job or any part thereof as it is finished. The finished part of the job in this case would be considered already delivered to its owner, and the appropriate portion of the wages would be the right of the worker.
- On the other hand, the worker is obliged to finish the entire job. Then, if the object (e.g. a building) were to fall, the worker would be paid for the appropriate part of the job done that far, or the full wage if the work was finished prior to its destruction.

As we have seen, this is in contrast to the case where the work is done away from the owner, in which case the wages are only due after the job is finished and delivered to the owner.

Chapter 18

Resolving Disagreements

If the lessor and lessee in a valid lease contract were to disagree over the agreed-upon compensations, we have to consider the two cases where the disagreement occurs before or after consumption of the usufruct:¹

- If they disagree prior to any consumption of the usufruct, then each of them demands an oath from the other to back his claim. This ruling is based on the *Hadīth*: “If a buyer and seller disagree over what they had contracted upon, they should exchange oaths, and [then, if necessary] return each other’s property”.² This *Hadīth* clearly applies to leases, since a lease is simply a sale of usufruct. In this case, if they both take oaths to back their claims, the lease is voided, and if one of them refuses to take an oath, then he has to accept the other’s claim.

If both parties can provide proof to backup their claims, then:

- If the disagreement pertains to the wages or rent, then the lessor’s claim is given priority, since he would normally demand a higher wage or rent.
- If the disagreement pertains to the leased object, then the lessee’s claim is given priority, since he would normally demand more usufruct and benefit.
- If the lessee had already derived some usufruct (e.g. lived in the house part of the lease period), then the lessee’s claim is given priority for the

¹ Al-Kāsānī ((Hanafi), vol.4, p.218 onwards), 'Ibn Al-Humām ((Hanafi), vol.7, p.218), Al-Sarakhsī (1st edition (Hanafi), vol.16, p.10), 'Ibn Ḩāfiẓ Al-Zayla'ī (Hanafi), vol.5, p.51).

²Narrated by the authors of the four *Sunan* and Al-Shāfi'ī in a variety of ways. One narration states: “If the buyer and seller disagree without proof, then the seller’s claim is honored, otherwise, they return each other’s properties”. Ibn Mājah and 'Aḥmad added to the *Hadīth* a clause that the object of sale were still intact. This *Hadīth* was deemed *hasan* by Al-Hākim and 'Ibn Al-Sakan, c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.5 onwards), Al-Shawkānī (, vol.5, p.223). Al-Shawkānī said: “Since the most common narration does not add the clause that the merchandise remain intact, this clause is not necessary. In this case, returning each other’s property without the clause of remaining intact would be satisfied by returning an equivalent good for fungibles and the appropriate value for non-fungibles.”

used part, and the remainder is voided by mutual oath taking. This ruling is based on the view that the sale of usufruct occurs gradually over time. Thus, the remaining portion of a lease can be viewed as a separate lease, and the rule of mutual oath taking applies.

- On the other hand, if the entire lease period or task is finished prior to the disagreement, then the lessee's claim is accepted if he takes a supporting oath. In this case, the lessor does not take an oath, since mutual oath taking would result in voiding the contract. After the lease contract's conclusion, there is no remaining object for the contract, and hence it cannot be voided ex post.

18.1 Disagreements over the product

If the customer claims that the hired worker produced a product that is different from what they had agreed upon, then the customer's claim is accepted if he supports it with an oath. This is the accepted Shāfi'i opinion³ based on the argument that the commission to perform the work originated with the customer, whose claims regarding the commission and its nature are accepted. In this case, if the customer does take the supporting oath, the hired worker guarantees compensation. In other words, the customer has the option of taking the product and paying the wages for producing a similar one, or demand that the hired worker produces the agreed-upon good.

The Shāfi'i ruled that if the lessor and lessee disagree over a defect in the product, the lessee's claim is given priority if he supports it with an oath. This follows since the lessee is entrusted with the leased item, and thus his claim is accepted.

On the other hand, they ruled that if the lessee claims to have returned the item to the lessor, and the lessor denies it, then the lessor's claim is given priority if he supports it with an oath. In this case, since the normal procedure is for the lessee to keep the leased item for the duration of the lease, the claim of the one who denies an unconventional return of the item is accepted if supported by his oath.

18.2 Disagreement over wage entitlement

If the customer and hired worker disagree over whether or not the worker deserved wages, the Ḥanafis differed in opinion:

- 'Abū Ḥanīfa ruled that the customer's claim is given priority, since he is denying the claim that the contract required wage payment, while the worker affirms it. He thus gave priority to the denier.⁴

³Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.354).

⁴[tr. The Ḥadīth upon which this general is based will be studied in later chapters.]

- 'Abū Yūsuf ruled that the worker in this case is entitled to wages if there is a repeated relation between him and the customer, and if he usually collected wages for that task. Otherwise, the customer's claim would gain priority and wages do not accrue to the worker.
- Muḥammad ruled that if the worker usually collects wages for the given task, then his claim is accepted and he deserves the wages. Thus, he ruled that opening a shop to collect wages for various tasks is apparently equivalent to having an explicit statement of his wages in the lease contract.
- Al-Mirghinānī argued in *Al-Hidāyah* (vol.3, p.201) that the ruling by analogy would be that of 'Abū Ḥanīfa. The ruling of 'Abū Yūsuf and Muḥammad, based on juristic approbation, is thus rebuffed with the view that the worker needs to establish that he deserves the wages, which cannot be established through apparent conventions. The establishment of such a right to collecting wages requires a strong proof or oath.

Chapter 19

Lease Termination

In what follows, we list four courses of events that may result in terminating a lease:

19.1 Death of one party

As we have seen, the Hanafis ruled that if either the lessor or the lessee were to die during the lease period, the contract is terminated. Their ruling was based on the view that the future usufruct is non-existent at the time of death, and hence cannot be bequeathed. Therefore, they ruled that the lease contract needs to be renewed with the heirs in order to continue. However, they ruled that if the lessor's legal agent were to die, the lease would still continue since the contract does not relate to his property. In the case of hiring a wet-nurse the death of the infant or the wet-nurse would result in automatic termination of the contract.

On the other hand, the majority of jurists ruled that a lease contract is not terminated based on the death of one of the parties. They based this ruling on the view that the lease contract is as binding as a sale. In other words, the lessee is deemed to own the full usufruct specified in the contract at the inception of the contract, and the contract is binding. Thus, the ownership of the remaining usufruct is - in their opinion - bequeathed to the lessee's heirs. However, they do agree with the Hanafis in the case of death of the infant or the wet-nurse, since derivation of usufruct becomes impossible in this special case.¹

19.2 Revocation

A lease contract may be terminated through revocation (*'iqālah*). This follows since it is a commutative financial contract in which one party's property is

¹Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.227), Al-Dardīr ((Mālikī)B, vol.4, p.30), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.406), 'Ibn Qudāmah (, vol.5, p.456), 'Ibn Juzayy ((Mālikī), p.278).

exchanged for another's. Thus, all the conditions that make revocation possible for sales contracts also apply for leases.

19.3 Perishing of the leased object

If the leased object (e.g. a house or riding animal) were to perish, or if the materials used by a hired worker (e.g. cloth for making a dress) were to perish, the lease is terminated. In all such cases, it is impossible for the contract to be executed, and hence becomes nugatory.

However, if a contract involved leasing generally defined means of transportation, and the delivered means of transportation were to perish, the contract remains intact. In this case, the object of the lease was usufruct that is established as a liability on the lessor, who remains obligated to provide alternative similar means of transportation. All four Sunni schools of jurisprudence agree on this decision.²

Al-Zayla^{cT} ruled based on the opinion of 'Imām Muḥammad ibn Al-Hasan that the lease is never terminated based on destruction or perishing of the leased object. Even if a leased house suffers significant damages, they argue, the land may be used for pitching a tent. More generally, they ruled that the usufruct may return to existence (e.g. by rebuilding the fallen part of the house), and thus only an insurmountable obstacle to returning the usufruct (e.g. total destruction of the house) would terminate the lease. Consent of the lessor is not a requirement in the latter case. This seems to be the most widely accepted opinion in the Ḥanafi school, as supported in 'Ibn ^cĀbidīn ((Hanafi)).

19.4 Expiration of the lease period

A lease is normally terminated at the end of the specified lease period, unless there is an excuse to prevent its termination. Jurists agree on the general rule that the lease automatically expires at the end of its period, but give examples of extraordinary circumstances whereby the lease would have to be extended. One such example is the case where a lease of land expires with crops still unharvested. In this case, the lease would be extended until the lessee harvests all of his crop, and he is responsible to continue to pay rent at the going market rate for the duration of that lease extension.³

² Al-Kāsānī ((Hanafi), vol.4, pp.196,223), Al-Zayla^{cT} ((Hanafi Jurisprudence), vol.5, p.144), 'Ibn Al-Humām ((Hanafi), vol.7,p.220), 'Ibn ^cĀbidīn ((Hanafi), vol.5, pp.30,53), *Al-Farā'id Al-Bahiyya fī Al-Qawā'id Al-Fiqhiyya* by Shaykh Maḥmūd Hamza (p.84), 'Ibn Rūshd Al-Hafid ((Mālikī), vol.2, p.228), Al-Dardīn ((Mālikī)B, vol.4, p.29), 'Ibn Juzayy ((Mālikī), p.277), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.357), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.405), 'Ibn Qudāmah (, vol.5, pp.415,421,434), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.210).

³ Al-Kāsānī ((Hanafi), ibid.), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.218).

Part V

Promise of reward (*ji^cālah*)

Chapter 20

Promise of Reward (*ji^cālah*)

In this chapter, we shall define the contract, and discuss its legality and contract language. Then, we discuss the difference between a general promise of reward and the contract of hiring a specific worker for a specific task. Finally, we discuss the legal status of the contract, increase and diminution in the paid reward, and treatment of disagreements between the worker and the one promising the reward.

20.1 Definition

The contract of *ji^cālah*, sometimes named after the paid wages as *ju^cl*, is an open promise by one party to pay whoever performs a particular task a named reward (the *ju^cl*). This contract is binding unilaterally on the initiator who promised the given reward, and therefore concluded unilaterally. The legal definition given by jurists is: “*ji^cālah* is a binding promise to pay a named compensating for performing a difficult known or unknown task”.¹ The Mālikīs gave another definition linking the contract with that of hiring a worker: “*ji^cālah* is a hiring contract for a benefit that is possible to attain”²

Rewards for excellence in schoolwork, prizes for first place in a race, etc. also qualify under the category of *ji^cālah*. The most common example given by jurists is the one where a person announces a reward for whoever finds and returns his lost animal. However, the contract permits a variety of applications, including declaring a given reward for any physician who can heal a sick person, etc.

¹ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.429), Al-Buhūtī (3rd printing (Hanbali), vol.4, p.225), Al-Dardīr ((Mālikī)B, vol.4, p.79).

² Ibn Juzayy ((Mālikī), p.275), Al-Dardīr ((Mālikī)A, vol.4, p.60), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.232).

20.2 Legality of the contract

The Hanafis render *ji'ālah* impermissible based on *gharar*. They argue that the contract does not specify a particular job or time period for hiring the worker who collects the reward, as would be required in an *'ijārah*.³ However, they permitted it based on juristic approbation in the specific case of returning a run-away animal, specifying a minimum traveled distance and a fixed reward to cover travel costs.

On the other hand, the Mālikīs, Shāfi'īs, and Hanbalīs permit the contract.⁴ Their proof is the following Qur'anic verse in the story of Joseph (pbuh): "They said: we miss the great beaker of the king; for him who produces it is the reward of a camel load; I will be bound by it" [12:72]. They also find proof in the story on the authority of 'Abū Sa'īd Al-Khudriy (mAbpwh) narrated by most major narrators with the exception of Nasā'i. In this story, a group of companions of the Prophet (pbuh) were traveling through a town, and its residents were not hospitable to them. While they were there, the leader of the town was bitten by a snake. The town-folk asked the Prophet's companions, who among you can give healing blessing (*ruqyah*)? The companions said: You were inhospitable to us, so we shall not bless him unless you give us a reward. The town people then promised them a flock of sheep. One of the companions then blessed the man with the *Fatihah*, and he was healed. When the town's people gave them the sheep, the companions were hesitant to accept them without the Prophet's (pbuh) permission. When they asked the Prophet (pbuh), he laughed, and said that it was indeed a healing blessing, and ordered them to divide the sheep among them, and to give the Prophet (pbuh) a share.⁵

The latter ruling is more logical than the former, since it is often necessary to promise a reward to whoever can perform a difficult task or service. In this regard, ignorance of the exact work required or the time it will take to perform the task or service does not harm the contract, in contrast to the case of *'ijārah*. The difference between the two contracts stems from the fact that *ji'ālah* is not binding on the worker, whereas an *'ijārah* is binding on both parties. Moreover, we have seen that the *ji'ālah* contract was explicitly permitted by the Legislator as a special case.

20.3 Contract language

The *ji'ālah* contract is initiated and concluded by one party, and its conclusion requires acceptable contract language on the part of the one promising the

³Ibn 'Abidīn ((Hanafi), vol.3, pp.243.355-9; vol.5, pp.6,32), Al-Kāsānī ((Hanafi), vol.6, pp.203-5), 'Abd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.217 onwards).

⁴Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.233), 'Ibn Juzayy ((Mālikī), ibid.), Al-Dardīr ((Mālikī)A, ibid.), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.429), 'Ibn Qudāmah (, vol.5, p.656), Al-Buhūtī (3rd printing (Hanbalī), vol.4, p.225), 'Abū-'Isḥāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.411).

⁵Al-Shawkānī (, vol.5, p.289).

reward.⁶ This language requires an explicit request to perform a task, together with a specified and customary reward that is binding upon the one making the offer. If someone volunteers to perform that task, he deserves no reward. Also, if the one who promised the reward gives permission to a particular person to perform the task, but the person performs another, then he does not deserve the reward.

It is not necessary for the person promising the reward to be the owner of the property positively affected by the performed task. In this case, the worker may effect the benefit to the owner, and demand the promised reward from the one who promised it. It is also not necessary for any given worker to accept the offer in this contract, even if the one who offers the reward were to name a specific worker, since we have seen that *ji^cālah* is binding one party alone.

On the other hand, the one promising the reward may promise it to a specific person if he performs a task, or he can make the promise generally to anyone who performs that task. He may even specify one reward if a specific person performs the task, and another reward if another person were to perform it.

20.4 Differences between *ji^cālah* and *ijārah*

There are four main differences between promising a reward for performing a task or service (e.g. returning a lost animal) and hiring a worker to do a particular job (e.g. build a house):⁷

1. The reward seeker in a *ji^cālah* may not collect his reward except at the end of the task (e.g. returning the lost animal or healing the sick person). On the other hand, the hired worker may collect his wages in proportion to the finished portion of the job.
2. *Gharar* is tolerated in *ji^cālah*, allowing the specific task and time period to be unknown. On the other hand, we have seen that hiring a worker requires specification of either the job or the time period for which he works.
3. A hired worker may stipulate a condition of prepayment of his wages, while prepayment of the reward is impermissible in *ji^cālah*.
4. *Ji^cālah* is permissible but not binding on the second party, and thus may be voided unilaterally. On the other hand, the lease and employment contracts are binding on both parties and may not be voided without a legal reason.

⁶ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.429 onwards), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.411), ’Ibn Qudāmah (, vol.5, p.658), Al-Dardīr ((Mālikī)B, vol.4, p.81), Al-Dardīr ((Mālikī)A, vol.4, p.60).

⁷ ’Ibn Juzayy ((Mālikī), p.275), ’Ibn Rushd Al-Ḥafīd ((Mālikī), vol.2, p.233), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.430), Al-Buhūtī (3rd printing (Hanbalī), vol.4, p.225 onwards), ’Ibn Qudāmah (, vol.5, p.657 onwards).

20.5 Conditions of *ji'ālah*

There are four conditions for the validity of a *ji'ālah* contract:⁸

1. The Shāfi'īs and Ḥanbalīs require the promisor in a *ji'ālah* (whether or not he owns the affected property) to be sane, of legal age, and eligible for conducting financial transactions. They also require the worker to be eligible for work (e.g. must be sufficiently old).

The Mālikīs and Ḥanafīs relax one condition of contract conclusion by permitting the issuer of the promise to be a discerning child. Full eligibility (including being of legal age) is considered a condition of bindingness in their schools.

2. The reward or wages must be known permissible properties, otherwise the contract is deemed defective.
3. The benefit generated by the worker must be legally permissible. The general legal rule is this:⁹ whatever merits compensation in a lease or employment contract, merits a compensation in the reward promise contract, and whatever does not merit compensation in the first does not merit it in the second. Proof of this rule is deduced from the verse: “But help not one another in sin and rancor” [5:2].

On the other hand, the Mālikīs ruled that any task meriting compensation in *ji'ālah* merits compensation in *'ijārah*. However, they argued, the opposite is not true, since hiring a person for one months in exchange for wages is permissible as an *'ijārah* but not as a *ji'ālah*. Thus, *'ijārah* is the more general contract that allows the employer to derive benefits in the interim, prior to the contract's end.

In the sphere of religious services, we have seen that no compensation may be paid for performing acts that only benefit the performer (e.g. prayers and fasting). However, services that benefit others as well (e.g. calling for prayers, teaching of Qur'ān and jurisprudence, etc.) may be rewarded with a *ju'l* based on the above referenced *Hadīth* of 'Abū Sa'īd (mAbpwh).

The Mālikīs also stipulated that the payer of a compensation must be deriving a benefit from the task. Thus, they would not permit a person to pay a reward to anyone who climbs a mountain. The Shāfi'īs, on the other hand, did not stipulate that condition, but required that the task must involve some difficulty to warrant compensation.

4. The Mālikīs required that the *ji'ālah* have no time component, while other jurists permitted combining a task and a time period in the contract.

⁸Ibn Juzayy ((Mālikī), p.276), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.1, p.430 onwards), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.411), 'Ibn Qudāmah (, vol.5, pp.656-660), Al-Buhūtī (3rd printing (Hanbalī), vol.4, pp.225-8), Al-Dardīr ((Mālikī)A, vol.4, p.64), Al-Dardīr ((Mālikī)B, vol.4, p.81).

⁹Al-Buhūtī (3rd printing (Hanbalī), vol.4, p.228), Al-Dardīr ((Mālikī)A, vol.4, p.63 onwards), Al-Dardīr ((Maliki)B, vol.4, p.84).

Thus, the non-Mālikīs permit promising a defined compensation for anyone who sews a dress in one day. This is another major distinction between *'ijārah* (where combining definitions of the task and the time period is not allowed) and *ji'ālah* (where it is).

Some Mālikīs (in particular, Justice *'Abd Al-Wahhāb*, in disagreement with *'Ibn Rushd*) added a fifth requirement that *ji'ālah* may only be used to effect the completion of simple tasks (e.g. bringing back lost animals).

Finally, we have seen that the Mālikīs do not permit having a condition of prepayment in *ju'l*, since it would be considered a loan that brings a probable benefit. However, they allowed prepayment if it was not stipulated as a condition.

20.6 Legal status and accrual of compensation

Jurists who permitted *ji'ālah* agreed that it is a permitted by non-binding condition.¹⁰ This distinguishes this contract from leases, and permits either party to void the contract. However, jurists differed over the timing of permissible voiding:

- The Mālikīs permitted voiding the contract prior to the worker's embarking on the task. Once the work begins, the one who promised the reward is bound by the contract, while the worker remains unbound in all cases.
- The Shāfi'īs and Ḥanbalīs also ruled that both parties have the right to void the contract prior to embarking on the task, and that the worker has the right to void the contract at any time.

If the worker began the work, and then the other party voided the contract, then most of the Shāfi'īs ruled that he must pay the worker the going market wage for the work he had done. This is in analogy to a silent partner's voiding of a contract after the worker began the work.¹¹

The Shāfi'īs also ruled along the same lines that if a worker returns the other party's lost property part of the way, he deserves a corresponding portion of the promised reward.¹² Also, if two workers participate in performing the task or service, the Shāfi'īs ruled that they share the reward.¹³

They also ruled that the worker has no right to withhold the item until he collects his reward. They ruled thus since withholding is only allowed if

¹⁰ *Ibn Rushd Al-Ḥafid* ((Mālikī), vol.2, p.233), *Al-Dardīr* ((Mālikī)A, vol.4, pp.60,65), *Al-Khaṭīb Al-Shirbīnī* ((Shāfi'ī), vol.2, p.433), *'Abū-'Ishāq Al-Shirāzī* ((Shāfi'ī), vol.1, p.412), *Al-Buhūtī* (3rd printing (Ḥanbalī), vol.4, p.228), *Al-'Imām Al-Nawawī/Al-Subkī* ((Shāfi'ī), vol.5, p.657).

¹¹ *Ibn Juzayy* ((Mālikī), p.275), *Al-Dardīr* ((Mālikī)A, vol.4, p.61), *Al-Khaṭīb Al-Shirbīnī* ((Shāfi'ī), vol.4, p.433), *'Abū-'Ishāq Al-Shirāzī* ((Shāfi'ī), vol.1, p.412), *Al-Buhūtī* (3rd printing (Ḥanbalī), vol.2, p.225), *Ibn Qudāmah* (, vol.5, p.658).

¹² *Al-Khaṭīb Al-Shirbīnī* ((Shāfi'ī), vol.2, p.431).

¹³ *Al-Dardīr* ((Mālikī)A, vol.4, p.61), *Al-Khaṭīb Al-Shirbīnī* ((Shāfi'ī), vol.2, p.431), *'Ibn Qudāmah* (, vol.5, p.658).

the worker is deserving of the reward, but in a *ji'ālah*, he only deserves the reward after delivering the item.¹⁴ Moreover, they ruled that two conditions are necessary for the worker to deserve the reward: (i) he must have the prior permission of the employer, and (ii) he must deliver it.

20.7 Increase or diminution of the reward

The Shāfi'īs and Hanbalīs ruled that the party making the promise to reward a worker may increase or reduce the reward as he sees fit.¹⁵ This ruling follows from their view that *ji'ālah* is a non-binding contract, thus permitting changing the compensation in analogy to silent partnership. The Shāfi'īs permitted making such changes in the promised reward at any time prior to the completion of the job, even if work had already started. However, if the declared reward changes after the work had begun, the employer must pay the worker the market value of his work to date. This follows from their view that changing the declared reward is tantamount to voiding the first contract and initiating a new one. We have already seen that voiding the *ju'l* requires compensation of the worker at the going market wage. The Hanbalīs accepted this Shāfi'ī opinion and endorsed it.

20.8 Disagreement between the parties

We have to consider a number of different types of disagreements individually to determine whether the worker or the employer's claim is accepted if backed by an oath:¹⁶

- If they disagree about the very existence of the *ju'l* contract, then the claim of whoever is denying the existence of the contract is accepted if he backs it with an oath. This ruling follows from the fact that non-existence of the *ju'l* is the default.
- If they disagree over the nature of the task or who performed it, then the claim of the employer is again accepted if backed by his oath. In this case also, the default is that the work was not performed, and thus the denying claim gets priority. Similarly, the claim of the one who promised the reward gets priority if he claims that the worker did not perform the service (e.g. if he claims that the lost animal returned on its own).
- If the two parties disagree over the specifics of the task or promised reward (e.g. where the lost animal should have been delivered, or the size of the

¹⁴ Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.434).

¹⁵ Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.433), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.412), Al-Buhūtī (3rd printing (Hanbalī), vol.4, p.229).

¹⁶ Al-Dardīr ((Mālikī)A, vol.4, p.64), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.434), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.412), 'Ibn Qudāmah (, vol.5, p.660 onwards), Al-Buhūtī (3rd printing (Hanbalī), vol.4, p.229).

reward), then the Mālikīs and Shāfi‘īs ruled that both parties' claims gain equal priority, and they should exchange mutual oaths supporting their respective claims. In this case, if they both back their claims with an oath, the contract is voided, and the employer is bound to pay the worker the going market rate for his work, in analogy to the *'ijārah* contract.

The Ḥanbalīs, on the other hand, ruled that the employer's claim has priority if he backs it with an oath. This ruling is based on the view that the employer's claim always gets priority in matters pertaining to the amount of compensation originally promised. However, mutual oath taking is also permitted in analogy to sales and *'ijārah* where the two parties differ over the price or wages, respectively. In the latter case, mutual oath taking would result in voiding the contract and payment of the going market wages for the performed work.

20.9 Promise of reward vs. hires

There are five differences between issuing a promise of giving a reward for whoever performs a task (*jī‘ālah*), and hiring an individual to perform that task:

1. The promise to reward is valid, even if the worker is unknown or unspecified, but the hiring contract requires that the worker be known.
2. The promise to reward is valid, even if the task is unknown or unspecified, but the hiring contract requires that the task be known.
3. The promise of reward contract is concluded unilaterally without a worker's acceptance, while a hiring contract is not concluded without the acceptance of the worker.
4. The promise of reward contract is permissible but not binding, whereas the hiring contract is binding on both parties. Thus, the hiring contract cannot be voided unilaterally.
5. The worker is only entitled to a promised reward after the task is complete, while advance and interim payments of wages are permitted in a hiring contract.

Part VI

Partnerships (*al-sharikāt*)

Chapter 21

Introduction to Partnerships

Linguistically, the term for partnership (*sharikah*) signifies mixing of two properties in a manner that makes it impossible to define the separate parts. The majority of jurists then generalized the term to all partnership contracts, even if the component properties can still be individually identified. In this regard, they implied that the physical identification of the properties is overruled by the contract that enforces mixing them.¹

Jurists differed slightly in their definitions of partnerships:

- The Mālikīs defined it as a right for all the partners to deal with any part of the partnership's joint property.²
- The Ḥanbalīs defined partnership as sharing the rights to collect benefits from or deal in the properties of the partnership.³
- The Shāfi'īs defined it as an establishment of collective (*mashā'a*) rights [pertaining to some property] for two or more people.⁴
- The Ḥanafīs defined it as a contract between a group of individuals who share the capital and profits.⁵ This is the best definition, since it explicitly states the nature of partnerships as a contract, whereas the other definitions only mention the goals and outcomes of having a partnership.

¹Ibn Al-Humām ((Hanafi), vol.5, p.2), Al-Zayla'i ((Hanafi Jurisprudence), vol.3, p.312).

²Al-Dardīr ((Mālikī)A, vol.3, p.348).

³Ibn Qudāmah (, vol.5, p.1).

⁴Al-Khatīb Al-Shirbīnī ((Shāfi'ī)), vol.2, p.211), Al-Qalyūbī ((Shāfi'ī), vol.2, p.332).

⁵Ibn 'Abidīn ((Hanafi), vol.3, p.364).

21.1 Legality of Partnership

The legality of partnership contracts was established in the Qur'ān, Sunnah, and consensus of the Muslim scholars and community:

- Proofs are derived from the Qur'anic verses: “If more than two, then they share in a third” [4:12], and “truly many are the partners (in business) who wrong each other: not so do those who believe and work deeds of righteousness ...” [38:24].
- Proof of legality of partnerships is found in the *Hadīth Qudsi*⁶ where Allāh (swt) says: “I am the third of every two partners as long as neither one betrays the other. However, if one betrays the other, I leave their partnership”. This *Hadīth Qudsi* was narrated on the authority of 'Abū Hurayrah (mAbpwh) by 'Abū Dāwūd and Al-Hākim, who validated its chain of narration.⁷
- The Prophet (pbuh) found the people using the partnership contract and did not question this behavior, and there are many *Hadīths* that indicate his approval of the contract.⁸ One such *Hadīth* is: “Allāh supports the partners as long as they do not betray one another”.⁹ In general, Muslims have approved the legality of partnerships, with differences in opinion only existing over specific types that we shall discuss below.¹⁰

The wisdom in permitting partnerships is clear. The contract allows individuals to combine their properties in a manner that allows them to produce more wealth than they could each produce individually.

21.2 Types of partnerships

There are two main categories of partnerships: general partnership or as capital partnership (*sharikat al-'amlāk*), and contractual partnership (*sharikat al-'uqūd*). The first type of contracts gives very little flexibility to the partners than the second category, whereas the second type permits a variety of partnership forms, as we shall see.

⁶Tr: A *Hadīth* in which the Prophet (pbuh) narrates a saying with Allāh (swt) is the speaker.

⁷'Ibn Al-Qattān questioned the authenticity of the *Hadīth* due to his uncertainty regarding the credibility of Sa'īd ibn Hibbān. However, 'Ibn Hibbān had in fact listed this *Hadīth* as one of the most reliable. On the other hand, 'Abū Dāwūd and Al-Mundhiriy did not give an opinion on its authenticity. 'Abū Al-Qāsim Al-'Aṣbahānī narrated a similar *Hadīth* in his chapter on *Al-Targhib wa Al-Tarhib* on the authority of Ḥakīm ibn Ḥizām, c.f. 'Ibn Al-'Athīr Al-Jazārī (, vol.6, p.109), Al-Shawkānī (, vol.5, p.264).

⁸Al-Ḥāfiẓ Al-Zaylānī (1st edition, (Hadīth), vol.3, p.474), 'Ibn Al-'Athīr Al-Jazārī (, ibid.), 'Ibn Ḥajar (, p.251).

⁹Reported in 'Ibn Qudāmah (, vol.5, p.1).

¹⁰'Ibn Qudāmah (, ibid.).

21.2.1 General partnership

There are two types of general partnerships that originate without a partnership contract:¹¹

1. Voluntary general partnerships originate by a joint purchase or a joint receivership of gifts or bequests that they accept.
2. Involuntary general partnerships originate without any action of approval of the partners. For instance, heirs who inherit a property are automatically general partners in this property.

In this category of partnerships, none of the partners has a right to deal in the other's share.¹²

21.2.2 Contract-based partnership

There are a variety of partnerships that originate through a contract between two or more individuals to share properties (capital) and the profits derived therefrom.¹³ As we have seen, this type of partnership fits automatically under the Ḥanafī definition.

- The Ḥanbalīs enumerated five types of contract-based partnerships: (i) limited (rein) partnerships (*‘inān*), (ii) unlimited partnership (*mufāwaḍah*), (iii) physical partnership in labor (*al-’abdān*), (iv) credit partnerships (*al-wujūh*), and (v) silent partnerships.
- The Ḥanafīs enumerated six types: (i) capital partnership, (ii) physical labor partnerships, and (iii) credit partnerships; where each of those three types may be limited or unlimited.¹⁴
- The Mālikīs and Shāfi‘īs enumerated four types: (i) limited partnership, (ii) unlimited partnership, (iii) physical labor partnership, and (iv) credit partnership.¹⁵

Jurists agreed that limited partnerships are permitted and valid, but they differed over the other types:

- The Shāfi‘īs, Zāhirīs, and ’Imāmīs allow only limited (*al-‘inān*) and silent partnerships (*mudāraba*), rendering all the other types invalid.

¹¹ Al-Kāsānī ((Ḥanafī), vol.6, p.56), ’Ibn Al-Humām ((Ḥanafī), vol.5, p.3), ’Ibn ʻĀbidīn ((Ḥanafī), vol.3, p.364 onwards), *Majma‘ Al-Damānat* (p.284).

¹² Al-Kāsānī ((Ḥanafī), vol.6, p.65), Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.151), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.3, p.312).

¹³ Al-Jazīrī (1986, vol.3, p.83). Partnerships where profits are shared without sharing the ownership of capital are silent partnerships (*mudāraba*), which will be discussed later.

¹⁴ Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.3, p.313).

¹⁵ ’Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.248), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.212).

- The Ḥanbalīs permitted all types with the exception of unlimited partnerships.
- The Mālikīs permitted all types with the exception of credit partnerships and unlimited partnerships.
- The Ḥanafīs and Zaydīs permitted all partnership types listed above, as long as certain specified conditions are met for each.

In the remainder of this part, I shall follow the Ḥanafī classifications in covering contract-based partnerships. This part will consist of six chapters:

1. Origination of contract-based partnerships.
2. Conditions of contract-based partnerships.
3. Legal status of contract-based partnerships.
4. Characterization of the partnership contract, and the partner's rights.
5. What invalidates a partnership contract?
6. Defective partnerships.

I devote the entire next part to silent partnerships, which will not be covered here.

Chapter 22

Origination of Partnerships

The Ḥanafīs stipulate offer and acceptance as the cornerstone of the partnership contract. They recognize three types of partnerships, which I shall define and discuss below: (i) capital partnerships, (ii) credit partnerships, and (iii) physical labor partnerships.¹ The other schools of jurisprudence stipulate three cornerstones for the partnership contract: parties to the contract, object of the contract, and language of the contract.

22.1 Definition of Capital partnerships

In this form of partnership, two or more individuals share their capital, stipulating that whatever profits they earn are shared among them. The contract may either be limited (*sharikat al-^cinān*) or unlimited (*sharikat al-mufāwadah*).

22.1.1 Limited partnership (*sharikat al-^cinān*)

'Ibn Al-Mundhir stated that this form of partnership, where the partners share the capital, as well as profits and losses, is approved by consensus.² However, some differences existed among jurists over its conditions, as well as the etymology of the term (^cinān):

- According to one story, the origin of the term (^cinān = reins of horses) suggests the equality of partners in legal rights in dealing with the joint capital of the partnership. The metaphorical use to which this explanation refers is one of two horsemen riding side-by-side, with the reins of their horses also being side-to-side (hence equal).

¹Ibn Al-Humām ((Ḥanafī), vol.5, p.4 onwards), Al-Kāsānī ((Ḥanafī), vol.6, p.56), 'Ibn ʻAbidīn ((Ḥanafī), vol.3, p.368), *Majma^c Al-Damānāt* (p.297).

²The Ḥanafīs, Shāfiʻīs, Zaydīs, and Jaʻfarīs, Zāhīrīs, and some of the Ḥanbalīs, accept this definition, specifying that the partnership is built upon using the capital in trading. However, the Mālikīs and the majority of the Ḥanbalīs ruled that capital partnerships originate with the contract. The latter opinion is the one upon which legal structures were built, c.f. *Al-Sharikāt fī Al-Fiqh Al-'Islāmī* by Dr. ʻAlī Al-Khafīf (pp.23-35,48).

- A second story suggests that the origin of the term is the verb (*^canna* = to occur to someone), since the idea of partnership would occur to the two partners, and then they decide to share their capital.
- Al-Subkī suggested that the best supported origin of the term derives from the horse's reins, but signifies that each of the partners holds the proverbial reins of his partners, thus restricting their abilities to deal in the joint property.³

This is the most common form of partnerships.⁴ This partners in a *sharikat ^cinān* need not be equal in their contributions to capital, nor equal in their legal rights for using the property. Thus, one party may contribute more than another to the partnership, and one of the partners may have the exclusive right to run the affairs of the partnership.

Given this potential for great variation in legal rights of dealing in the joint property, each party is only responsible for dealings that he himself performed. Thus, while they share the profits according to any rule they agreed upon in the contract, they only share losses in proportion to their contributions to the partnership's capital. The general rule is summarized thus: "Profits are shared according to the parties' conditions, but losses are shared according to their shares in the capital".

22.1.2 Unlimited partnership (*sharikat al-mufāwadah*)

This form of partnership is built upon the concept of *mufāwadah*, whereby each of the partners delegates to the other (*yufawwiqahu*) the right to deal in his property. This form of partnership requires full equality of the parties in terms of their shares in the overall capital, their legal rights of controlling the affairs of the partnership, and they must be of the same religion.⁵ This equality makes each of them responsible for all the dealings of the other, as they share all rights and obligations equally.

The partners in this contract must include all their capital belonging to the genus of the partnership capital in the partnership. Thus, neither of them is

³Al-Tahāwī ((Hanafi), p.107), Al-Sarakhsī (1st edition (Hanafi), vol.11, p.151), 'Ibn Al-Humām ((Hanafi), vol.5, p.20), Al-Kāsānī ((Hanafi), vol.6, p.57), 'Ibn ^cĀbidīn ((Hanafi), vol.3, p.373), Al-Dardīr ((Mālikī)A, vol.3, p.359), 'Ibn Qudāmah (, vol.5, p.13), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.212).

⁴The Hanafis and Mālikis have different rules for *sharikat al-^cinān*. The Hanafis ruled that the contract implies that each partner is a legal agent for the other, and may therefore use his legal rights to deal in any part of the joint property. The Mālikis, on the other hand, do not stipulate this agency, and do not allow any of the partners to deal in the joint property without his partners' permission. The Hanafis call this more restrictive form partnership in property (*sharikat al-'amlāk*), while the Mālikis would consider the less limited form an unlimited partnership (*sharikat al-mufāwadah*), c.f. *Al-Sharikāt fī Al-Fiqh Al-Islāmī* by Dr. ^cAḥmad Al-Khaṭīb.

⁵'Abū Yūsuf permitted this form of partnership between people of different religions, but considered using this permission reprehensible (*makrūh*), c.f. 'Ibn ^cĀbidīn ((Hanafi), vol.3, p.369).

allowed to withhold capital of the same genus and keep it outside the partnership, which means that neither of them can be richer than the other in the specific form of capital. If one of them were indeed to own more capital than the other, then the contract would be deemed a limited one (*“inān”*).⁶ Thus, the partners share in all fungible earnings, including inheritance of money, finding a treasure, and receipts of legal compensations and torts. This is the opinion of 'Abū Ḥanīfa and Muḥammad.⁷ Thus, each of the partners put all of their fungible financial wealth into the partnership, with all the partners being equal in ownership, rights of unilateral dealing in the partnership's capital, and profit shares.

The Ḥanafīs and Zaydīs permitted this type of partnership based on the *Hadīth*: “If you engage in a *mufāwadah*, do it in the best possible way”, as well as the *Hadīth*: “Engage in *mufāwadah* (i.e. share your capital), for that increases the blessings of the wealth”.⁸ This contract is also legitimized by its conventional use in different eras. In this regard, the ignorance involved in permitting partners to trade in unknown ways is tolerated in analogy to silent partnerships.

The Mālikīs, on the other hand, permitted *mufāwadah* in a manner different from its Ḥanafī form. They stipulate that the partners have equal rights for unilateral actions in trading and all other business decisions. However, those rights only apply to the capital designated by each of them as part of the partnership, and they are allowed to keep some of their fungible wealth outside the partnership. If the legal rights of partners in the partnership's capital are made unequal, then the Mālikīs call it a limited partnership (*sharikat “inān”*).⁹

It is clear that the Ḥanafī version of *sharikat al-mufāwadah* has very difficult conditions,¹⁰ whereas the Mālikī version is acceptable to other schools of jurisprudence. In particular, the version suggested by the Ḥanafīs and Zaydīs is not accepted by the Shāfi'īs, Ḥanbalīs, and others, since they find no legal foundation for its conditions. In addition, they comment that the exact equality required by the Ḥanafī version is virtually impossible to occur. Finally, they

⁶Note that the partners in a *mufāwadah* does not share non-fungible gifts or inheritance that he may receive. This is the opinion of all jurists with the exception of 'Ibn 'Abī Laylā.

⁷Al-Sarakhsī (1st edition (Hanafī), vol.11, pp.153,177,189), 'Ibn Al-Humām ((Hanafī), vol.5, p.5 onwards), Al-Kāsānī ((Hanafī), vol.6, p.58), Al-Zayla^cī ((Hanafī Jurisprudence), vol.3, p.313), *Majma^c Al-Ḍamānāt* (p.294). 'Ibn ^cĀbidīn ((Hanafī), vol.3, pp.369-372), Al-Tahāwī ((Hanafī), p.106), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.251), Al-Dardīr ((Mālikī)A, vol.3, p.351), Al-Khaṭīb Al-Shirbīmī ((Shāfi'ī), vol.2, p.212), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.364), 'Ibn Qudāmah (, vol.5, p.26), Al-Jazīrī (1986, vol.3, p.89), Al-Shā'arānī ((Shāfi'ī), vol.1, p.82), *Al-Muntaza^c Al-Mukhtār* (vol.3, p.354).

⁸Al-Ḥāfiẓ Al-Zayla^cī found both *Hadīths* strange. Then he tried to find a chain of narration for the *Hadīth*, and found that 'Ibn Mājah reported in his *Sunan a Ḥadīth* on the authority of Suhayb in which the Prophet (pbuh) said: “Three actions increase the blessings of wealth: credit sales, silent partnership (*muqāradah*), and mixing wheat and barley for home usage, not for trading”. Then, he said that some versions of 'Ibn Mājah used the term *mufāwadah* in place of *muqāradah*, c.f. Al-Ḥāfiẓ Al-Zayla^cī (1st edition, (Hadīth), vol.3, p.475).

⁹*Al-Sharikāt fi Al-Fiqh Al-'Islāmī* by Dr. ^cAlī Al-Khaffif (p.34), 'Ibn Hubayrah ((Hanbalī), p.25), 'Ibn Juzayy ((Mālikī), p.283), Al-Dardīr ((Mālikī)A, vol.3, pp.351,359), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.43).

¹⁰*Al-Sharikāt fi Al-Fiqh Al-'Islāmī* by Dr. ^cAlī Al-Khaffif (p.61).

ruled that it contained significant *gharar* due to ignorance of what any of the partners may do with the property.

To explain the nature of the *gharar* inherent in the Ḥanafī version, jurists note that the partners would be forced under that version to accept liabilities based on the actions of others. Some of those liabilities may even be beyond their ability to meet. Thus, Al-Shāfi‘ī said rhetorically: “If [this form of] *sharikat al-mufāwadah* is not an invalid, then I do not know of any invalid contracts”. Moreover, the *Hadīths* used to justify the Ḥanafī version is: (i) unknown to jurists and absent from the *Sunan*, and (ii) even if they were authentic, they do not necessarily mean that the Ḥanafī interpretation of *mufāwadah* was the one mentioned there.¹¹

22.2 Credit partnerships (*sharikat al-wujūh*)

In this type of partnership, two or more creditworthy individuals join in a credit purchase, and follow it with a cash-and-carry sale, thus sharing the profits according to the conditions stipulated in the contract.

- The Ḥanafis, Ḥanbalis, and Zaydīs permitted this type of partnership, whereby each partner delegates to the other trading rights. Moreover, they argued that this type of partnership was used in different times and places with no legal objections, hence determining that it constitutes a type of business for which partnerships may be established.¹²
- On the other hand, the Mālikīs, Shāfi‘īs, Zāhirīs, ‘Imāmīs, Al-Layth, ’Abū Sulaymān, and ’Abū Thawr all ruled that this type of partnership is invalid. They based this ruling on the view that partnerships must be over property (capital) or work, neither of which exists in this case.¹³

Those who permit this type of partnership permit unequal ownership of the object bought in the initial credit sale, based on the *Hadīth*: “Muslims are bound by their conditions”. In this case, profits and losses must be determined according to the partners’ shares in ownership. This follows from the fact that profits are justified by the degree of responsibility for the object of the original credit

¹¹The Ḥanbalis ruled that the proper *mufāwadah* involves all normal rights and responsibilities associated with the business operations of the partnership, but excluding any liabilities that one of them incurs due to causing damage to the property of another, and excluding any gains or inheritance that is not associated with the partnership, c.f. Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.182), ’Ibn Qudāmah (, vol.5, p.26). The Ḥanbalis also allow a *sharikat al-mufāwadah* to include a variety of partnerships, including a limited partnership, credit partnership, and physical labor partnership, since each type is valid on its own, and thus become valid in conjunction, c.f. ’Ibn Qudāmah (, vol.5, p.25).

¹²Mar‘ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.180), ’Ibn Qudāmah (, vol.5, p.12), Al-Kāsānī ((Hanafī), vol.6, p.57), ’Ibn Al-Humām ((Hanafī), vol.5, p.30 onwards), *Majma‘ Al-Damānat* (p.303), Al-Sarakhsī (1st edition (Hanafī), vol.11, p.145). This type of partnership may be rendered legally valid where the partnership’s capital is the object of the credit sale.

¹³’Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.252), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.55), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.212), ’Abū-Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.346), Al-Sha‘arānī ((Shāfi‘ī), vol.1, p.83), ’Ibn Juzayy ((Mālikī), p.284).

purchase. Since this responsibility is determined in proportion to ownership, so also must be the profits and losses.

22.3 Physical labor partnership (*sharikat al-'a^cmāl*)

In this type of partnership, two or more individuals agree to embark on a joint labor project (e.g. building a house), sharing the wages according to their stipulated conditions in the contract. The partners may be of similar or different professions (e.g. a carpenter and a blacksmith). This type of partnership has many names: *sharikat al-'a^cmāl*, *al-'abdān*, *al-ṣanā'ī*, etc.

- The Mālikīs, Ḥanafīs, Ḥambalīs, and Zaydīs permitted this type of partnership based on the view that its purpose is to collect profits, which may be effected through agency (*tawkīl*). Second, they justified the contract by its common historical usage. Third, they argued that a partnership must be based on property (capital) or work (as in a silent partnership), and this partnership falls in the second category.¹⁴ Finally, they cite the *Hadīth* in which 'Ibn Mas'ūd (mAbpwh) said: “‘Amīr, Sa‘d, and I joined on the day of Badr, whereby Sa‘d managed to capture two prisoners of war, while ‘Amīr and I did not capture any, but the Prophet (pbuh) did not deny us our share”.¹⁵
- The Mālikīs, on the other hand, restrict this type of partnership to workers in the same profession, or workers of whom one cannot work without the other (e.g. one who weaves the cloth and one who sews it into a dress). However, they do not require that the workers be in the same location.

The Mālikīs also require that profits be shared in proportion to the work done, allowing either to give the other more in charity. However, they ruled that the contract would be defective if unequal distribution of the profits is stipulated as a condition.

- The Ḥanbalīs allowed this type of partnership even in unconventional endeavors such as hunting in public water, or spying on enemies, etc. However, they ruled out partnerships of auctioneers.
- In contrast, the Shāfi‘īs, Ḥimāmīs, and the Ḥanafī jurist Zufar ruled that this type of partnership is invalid. This follows from their view that partnerships can only be effected by sharing capital, and cannot be effected

¹⁴ Al-Kāsānī ((Ḥanafī), vol.6, pp.57,76), 'Ibn Al-Humām ((Ḥanafī), vol.5, p.28), Al-Taḥāwī ((Ḥanafī), p.107), Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.154 onwards), *Majma‘ Al-Damānāt* (p.303), 'Ibn 'Abidīn ((Ḥanafī), vol.3, p.380), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.252), 'Ibn Qudāmah (, vol.5, pp.2,11), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, pp.38,51-53), 'Ibn Juzayy ((Mālikī), p.284), Mar'i ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.180), *Al-Sharikāt fi Al-Fiqh Al-'Islāmī* by Dr. 'Alī Al-Khāfi (p.99).

¹⁵ Narrated by 'Abū Dāwūd, Al-Nasā'ī and 'Ibn Mājah on the authority of 'Abū 'Ubaydah ibn 'Abd-Allāh. 'Ibn Taymiya said in his book *Munṭaqā Al-Akhbār 'an Sayyidi Al-'Akhyār* that this *Hadīth* is proof of the validity of work or labor partnerships, c.f. 'Ibn Al-'Athīr Al-Jazārī (, vol.6, p.108), Al-Shawkānī (, vol.5, p.265).

by sharing labor.¹⁶ This view is in turn based on the argument that labor cannot be measured accurately, thus leading to *gharar*. In this case, it is difficult for each partner to know whether or not the other earned any profits, and it is difficult for each partner to make sure that his partner does not shirk on the job. In such cases, sharing the profits would lead to injustice. Better, they argue, to let each worker collect the fruits of his own labor, which will be determined by his abilities and his effort. Thus, the Hanafis ruled that partnership in utilizing public properties (e.g. fishing in public water) is not permitted, since partnership is based on unlimited, and there is no agency in ownership of public property.¹⁷

¹⁶Some civil laws also invalidated this type of partnerships based on the view that they have no traditional capital, and the partners' labor does not qualify as a permissible form of capital.

¹⁷Ibn Al-Humām ((Hanafi), vol.5, p.31), Al-Khatib Al-Shirbīnī ((Shāfi'i), vol.2, p.212).

Chapter 23

Partnership Conditions

The Ḥanafīs stipulated two sets of conditions for contract based partnerships. The first set applies to all such contracts, and the second set stipulates special conditions for each type of partnership. In what follows, we cover both sets of such conditions.

23.1 General conditions

The Ḥanafīs stipulated the following general conditions for all types of contract-based partnerships:¹

1. The actions upon which the contract is written must be permissible for delegation.² This condition follows from the fact that profit sharing is predicated upon benefiting from trading. The benefit from trading cannot be shared unless each partner delegates to the other the authority of trading in part of the partnership's capital, while himself working with another part of that capital. Thus, all the partners must be eligible to act as a legal proxy (*wakil*) for the other partners, and the capital of the partnership must also be eligible for delegation of legal authority. In this regard, we have seen that the Ḥanafīs differ from the other schools by making the utilization of public properties (e.g. grazing, fishing, etc.) ineligible for delegation.
2. The ratios of profit sharing must be known precisely, otherwise the partnership is rendered defective.

¹Ibn Al-Humām ((Hanafi), vol.5, p.5 onwards), Al-Kāsānī ((Hanafi), vol.6, p.58 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.213), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.39).

²The Ḥanafīs stipulated this set of conditions to rule-out partnerships in the utilization of public properties (e.g. fishing, hunting, grazing, etc.). In such cases, they ruled that whoever utilizes the public property gains immediate and private ownership. On the other hand, the majority of jurists, including the majority of Shāfi'iṣ, permitted delegation and partnerships in the utilization of public properties. [tr.: we use the terms "delegation" and "agency" interchangeably for the Arabic term *wakālah*].

3. The profit shares must not be specified as a particular amount (e.g. \$100) since the total amount of profits are unknown.

23.2 Conditions for capital partnerships

The following conditions for capital partnerships apply both to limited as well as unlimited partnerships:³

23.2.1 Specification of the capital

The majority of jurists agree that partnership capital must be non-fungible, i.e. specified, and present at the time of the contract or at the time of making a trade. This follows from the fact that the partnership is initiated to realize profits through dealing in the property. If the capital were a liability or a non-present property, then dealing in it would be impossible, and the reason for having a partnership would be nullified.

However, it is not always necessary for the capital to be present at the time of writing the contract, but it must be present at the time of trading. Thus, consider the case where a person gives another \$1000 and asks him to match it with another \$1000, and to trade with the total capital and share the profits with him. If the second person later brings \$1000 and trades with the \$2000, the partnership is valid. In this regard, the partnership is actually realized only when the trading begins, and that is when the capital needs to be present.

Is it necessary to mix the properties?

The Ḥanafīs, Mālikīs, and Ḥanbalīs ruled that it is not necessary to mix the properties of the partners, since the purpose of the partnership is realized through the contract, and not through the physical mixing of properties.⁴ In analogy to silent partnership, profits from the capital are shared in accordance with the contract with mixing properties of the partners. Moreover, a partnership is primarily a contract of agency and delegation, which may be exercised without mixing properties.⁵ Therefore, the partnership is valid if the partners explicitly mention that one of them uses some Dollars for trading, while the other uses certain Euros.

On the other hand, the Mālikīs argued that there must be some form of mixing of the capital: either physically or legally. Thus, 'Ibn Rushd said: "Legal

³ Al-Kāsānī ((Hanafi), vol.6, p.59 onwards), Marṣī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.166).

⁴ Al-Tahāwī ((Hanafi), p.107), 'Ibn Al-Humām ((Hanafi), ibid, p.24), Al-Kāsānī ((Hanafi), vol.6, p.60), Al-Sarakhsī (1st edition (Hanafi), vol.11, p.177), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.250), 'Ibn Juzayy ((Mālikī), p.283), 'Ibn Qudāmah (, vol.5, p.16), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.14), Marṣī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.162).

⁵ Notice that the question of mixing properties is not raised in most civil laws. In such laws, partnerships are established as a legal personality, to which ownership of all capital is transferred, c.f. *Al-Sharikāt fī Al-Fiqh Al-'Islāmī* by Dr. 'Alī Al-Khāfi (p.46).

understanding would point out that partnerships are made better through mixing the capital, since partners would then have equal incentives in preserving each others' wealth that they have in preserving their own".⁶

At the other extreme, Zufar, the Shāfi‘īs, the Zāhirīs, the Zaydīs, and the ‘Imāmīs ruled that the two properties must be mixed in a manner that makes them indistinguishable from one another. Moreover, they ruled that the mixing must occur prior to the conclusion of the contract. This follows since any part of the partnership's capital that perishes must perish in the property of all partners, thus requiring mixture lest only one of the partners incur the entire loss. In this regard, they ruled that partnership essentially means the mixing of capital, without which it serves no economic purpose.⁷

This difference in opinion results in different rulings for partnerships with capital of different genera (e.g. gold and silver), etc. Since the majority of jurists do not require mixture of the capital, they permit partnerships where the partners contribute capital of different genera. On the other hand, the Shāfi‘īs and Zufar do not allow such partnerships, since they require capital mixture to the point where the components cannot be recognized.

23.2.2 Partnership capital must be monetary

Most jurists agree that the capital of a partnership must be made of fungible monies (e.g. gold and silver coins, or contemporary currencies).⁸ Thus, non-fungibles (e.g. real estate, cars, etc.) may not be used as capital in partnerships. This follows since such non-fungibles have varying values, thus rendering the different partners' shares in capital (and thus shares in profits) unknown, leading to potential legal disputes. Moreover, non-fungible properties are not eligible for agency and delegation. For instance it is not permitted for someone to tell another "sell your house, and we share the price", since the house clearly belongs to the owner. In contrast, it is permissible to say to another "you buy goods with \$1000 and I buy goods with \$1000, and we share whatever each of us makes".

The Ḥanbalīs and most of the Ḥanafīs take this requirement to imply that gold and silver dust and nuggets are not permissible as contributions to the capital of a partnership, judging that such metals are non-fungible. Some of the Ḥanafīs ruled that such raw metals may be used as money, and thus the ruling depends on convention. The Shāfi‘īs went further by ruling universally that such raw metals are fungible, and hence permissible as capital in a partnership.

The Ḥanafīs also differed over copper coins, which are sometimes treated as money and at other times are not accepted as legal tender and treated as non-

⁶:Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.250).

⁷Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.213), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.345), *Al-Muntaza^c Al-Mukhtār* (vol.3, p.354).

⁸Al-Kāṣānī ((Hanafī), vol.6, p.59), 'Ibn Al-Humām ((Hanafī), vol.5, p.14), Al-Zayla^cī ((Hanafī Jurisprudence), vol.3, p.316), Al-Tahāwī ((Hanafī), p.107), Al-Sarakhsī (1st edition (Hanafī), vol.11, p.159 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.213), 'Ibn Qudāmah (, vol.5, p.13), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.345), 'Ibn 'Ābidīn ((Hanafī), vol.3, p.372), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.40).

fungible properties. Thus, 'Abū Ḥanīfa, 'Abū Yūsuf, the Shāfi'īs, the Hanbalīs, and the Mālikī jurist 'Ibn Al-Qāsim ruled that copper coins may not be used as capital in a partnership, whereas Muḥammad ruled that if such coins are accepted as money, then they may be used as capital in a partnership.⁹

On the other hand, the Mālikīs ruled that a partnership's capital need not be monetary. Thus, they allow non-fungibles of similar or different genera to be used as contributions to a partnership's capital. In this case, the partners' shares in capital are determined based on the values of their contributions. Since those values are known, they ruled that the contract is established in the same manner whether or not the capital is monetary.¹⁰

Partnerships with fungible capital

Jurists differed over the validity of partnerships established with fungible but non-monetary capital, i.e. goods measured by weight, volume or number of homogeneous items:

- The Shāfi'īs and Mālikīs permitted partnerships established with this form of capital. The Shāfi'īs base this permission on the view that fungibles measurable by number are similar to money in their fungibility, and goods measured by weight and volume - also in similarity to money – become indistinguishable once mixed. The Mālikīs permitted such partnerships on the condition that fungible capital shares are determined based on their value at the time they are mixed, and not at the time of trading. This is in contrast to their treatment of non-fungible capital, which is distinguishable at trading time, and hence may be assessed at that time.¹¹
- The majority of Hanbalīs did not permit partnerships the capital of which constitutes of non-monetary fungibles, in analogy to their ruling for non-fungible capital.¹²
- The Ḥanafīs, 'Imāmīs and Zaydīs ruled that partnerships with this type of capital are not permissible prior to mixing the capital. This ruling follows by their view that such goods (measurable by weight, volume, or number) become non-fungible by identification, thus become more like non-fungibles and less like money.

The Ḥanafīs had different opinions among themselves over the ruling after mixing such fungibles. They all agreed that if the fungibles were of different genera, then the partnership is not valid. However, if they were of the same genus, 'Abū Ḥanīfa and Muḥammad ruled - like the Shāfi'īs - that the partnership is valid. On the other hand, 'Abū Yūsuf ruled that the

⁹Al-Kāsānī ((Ḥanafī), vol.6, p.59), 'Ibn Qudāmah (, vol.5, p.15), Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.160), 'Ibn Ḩabīb ((Ḥanafī), vol.3, p.372), Marṭi ibn Yūsuf (1st printing (Hanbalī), vol.2, p.166).

¹⁰Al-Dardīr ((Mālikī)A, vol.3, p.349), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.249).

¹¹Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.213), Al-Dardīr ((Mālikī)A, vol.3, p.349).

¹²'Ibn Qudāmah (, vol.5, p.13 onwards).

partnership is still invalid as a capital partnership, but may be validated as a property partnership. This distinction can have practical implications. Thus, if two partners contribute equal amounts of the same-genus fungible, and stipulate that profits from trading the mixture are divided one-third to one and two-thirds to the other, Muhammad allows this division, while 'Abū Yūsuf insists that profits must be divided equally.

Thus, 'Abū Yūsuf relies on the fundamental Ḥanafī reasoning that the capital of a partnership must be monetary fungibles, whereas Muhammad argued that after mixing fungibles of the same genus, the agency and delegation that is necessary for partnerships may be effected. Of course, 'Abū Yūsuf still managed to find a legal loophole to admit a partnership by considering the mixed fungibles a joint property upon which the partnership is established.¹³

23.3 Conditions for unlimited partnerships

The Ḥanafīs stipulated a number of specific conditions for unlimited partnerships:¹⁴

1. The partners must be eligible to delegate legal authority, serve as a guarantor, as well as serve as legal agents of one another. Thus, they must be sane and of legal age. This follows from the joint responsibility for the actions of any of them, which requires considering each a legal agent of the other (*wakīl*), as well as a guarantor of the other (*kāfīl*).
 2. Partners' shares in the capital must be equal from beginning to end. Thus, the majority of Ḥanafīs say that inequality in wealth between the partners means that it is not an unlimited partnership.
 3. Each partner must include all of his wealth of the genus used as capital in the partnership.¹⁵
- The majority of Ḥanafīs did not require that the capital contributions be of the same genus, thus one may contribute silver and the other may contribute gold, as long as the contributions are of equal value. Also, all but Zufar did not require physical mixture of the capital, as we have seen.
4. Profits shares must be equal, since contributions to the capital are equal.

¹³ Al-Kāsānī ((Hanafi), vol.6, p.60), 'Ibn Al-Humām ((Hanafi), vol.5, p.16), Al-Sarakhsī (1st edition (Hanafi), vol.11, p.161 onwards).

¹⁴ Al-Kāsānī ((Hanafi), vol.6, pp.60 onwards), 'Ibn 'Ābidīn ((Hanafi), vol.3, p.369 onwards).

¹⁵ Thus, the authors of *Kanz Al-Daqāiq* and *Al-Durr Al-Mukhtār* ruled that an unlimited partnership is invalidated if one of the partners receives a gift or inheritance of the genus of the partnership's capital (which is money), since equality in capital shares would thus be violated, c.f. Al-Zayla'ī ((Hanafi Jurisprudence), vol.3, p.316), 'Ibn 'Ābidīn ((Hanafi), vol.3, p.372).

5. All permissible trading must be part of the partnership business, thus neither partner is allowed to trade on his own, since that would negate the mutual legal delegation and representation. This explains the condition stipulated by 'Abū Ḥanifa and Muḥammad that all partners must be Muslims, otherwise one would be able to conclude a trade (e.g. trade in wine or pork) that is not permitted for the other. However, as we have seen, 'Abū Yūsuf permitted unlimited partnership between a Muslim and non-Muslim if they are eligible for agency and guaranty.
6. The contract language must explicitly use the term “*mufāwadah*” to ensure that all the conditions of this contract are understood to apply.

If any of the unlimited partnership conditions are violated, the contract is considered a limited partnership (*sharikat ‘inān*). In the latter contract, none of the above conditions (eligibility for legal guaranty, equality of profit shares, and inclusion of all trading) are required to hold.

Professor ‘Alī Al-Khaffī said that the version of unlimited partnership considered by the Ḥanafīs and Zaydīs is extremely unrealistic. Even if all its conditions were satisfied at some point, it is very unlikely that they will continue to hold, especially the condition of exact equality in wealth.¹⁶

23.4 Conditions for labor partnerships

The conditions of unlimited partnerships apply to labor partnerships that are set thus (i.e. eligibility for legal guaranty, equality of wages, etc.). On the other hand, if it is a limited (*‘inān*) partnership, then only the eligibility for legal guaranty condition applies. Thus, 'Abū Ḥanīfa said: “Partnership is permissible if and only if agency is permissible”.

On the other hand, the Ḥanafīs and Ḥanbalīs considered partnerships defective if part of the partnership's income generating work is a rental of equipment. Thus, if a worker uses his machine in production, it becomes a permissible source of partnership wages. However, if any income is collected through renting such equipment, that income would belong to the owner of the equipment alone, and not to the partnership.¹⁷

23.5 Conditions for credit partnerships

If the credit partnership is an unlimited partnership, then:

1. The partners must be eligible as guarantors for one another.
2. The partners must be responsible for equal liability shares in the price of the purchased goods.

¹⁶See *Al-Sharikāt fī Al-Fiqh Al-‘Islāmī* by Dr. ‘Alī Al-Khaffī (p.63).

¹⁷Al-Kāṣānī ((Hanafi), vol.6, p.63 onwards), 'Ibn Qudāmah (, vol.5, p.6).

3. The partners share ownership in the purchased goods equally.
4. They share profits equally.
5. The term *mufāwadah* must be used explicitly in the contract language.

On the other hand, if the partnership is *‘inān*, then ownership, liability, and profits are all specified as fixed proportions for the partners. However, any condition that would make those proportions different (e.g. for ownership and profitability) would be invalid.¹⁸

¹⁸ Al-Kāsānī ((Hanafī), *ibid*, p.65).

Chapter 24

Partnership Status

The partnership may either be valid or defective. If any of the conditions of validity listed in the previous chapter are violated, then the partnership would be defective, and none of its legal effects would be considered.¹ In this case, the Ḥanafīs, Shāfi‘īs, and Ḥanbalīs ruled that partners in a defective partnership would share profits in proportion to their contributions to the capital, and each must pay the other wages for work done on his behalf.²

On the other hand, the legal status and consequences of a valid partnership varies with the nature of the partnership, as detailed below.

24.1 Limited capital partnerships

24.1.1 Work condition

It is permitted in a *‘inān* partnership to stipulate a condition that both will work or that only one will work. Thus, they may pool their capital, and either one of them trades with the capital and they then share the profits.

24.1.2 Profit distribution

In this type of partnership, profits must be distributed in proportion to the partners' contributions to the capital of the partnership, regardless of whether they both worked or only one did. This Ḥanafī ruling follows from the view that profits are earned either by investing capital, by working, or by assuming liability for damages (*damān*).³ In this first ruling, equality of capital shares leads to equality in profit shares.

¹ Al-Kāsānī ((Hanafī), vol.6, p.77).

² Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.215), 'Ibn Qudāmah (, vol.5, p.17), 'Ibn Al-Humām ((Hanafī), vol.5, p.33), Al-Zaylā'ī ((Hanafī Jurisprudence), vol.3, p.323), Marī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.169 onwards).

³ Profits are earned on capital as compensation for its time value, for work (as a proxy for wages), or for assuming liability based on the *Hadīth* “output belongs to the one who assumed the liability”.

Many Hanafis, with the notable exception of Zufar, also allowed unequal sharing in profits with equal capital shares if both parties worked, or if the one with the larger profit share worked alone. In this case, the higher profit share can be justified by more work, either in terms of quantity or skill. This ruling is validated by the *Hadīth*: “Profits are shared as stipulated in the contract, while losses are shared in proportion to capital shares”.⁴ This profit and loss sharing rule was also adopted by the Ḥanbalīs and Zaydīs.⁵

However, the Ḥanafis did not permit the one who worked less to collect a larger profit share, and did not permit one of the partners to collect the entire profit. In all of the above, notice that what matters for those legal opinions is the condition of work, not the actual realization of work.⁶

In contrast, the Mālikīs, Shāfi‘īs, Zāhirīs, and the Ḥanafī jurist Zufar ruled that both profits and losses must be shared in proportion to capital in a limited (*‘inān*) partnerships. Thus, they consider all profits and losses to be related to the capital, and hence must be shared according to the capital shares. Thus, they say that since it is not allowed for only one party to collect all of the profit or bear all of the losses, any proportion that deviates from capital shares would be equally impermissible.⁷

24.1.3 Perishing capital

The Ḥanafis and Shāfi‘īs ruled that if one or more of the contributions to a partnership’s capital were to perish prior to mixing, then the partnership is invalidated. This ruling follows since capital is the object of the partnership contract, and when the object of a contract perishes, the contract is invalidated in analogy to sales. If only one of the partners’ capital were to perish before mixing, it perishes in his property, and thus the potential partners’ acceptance of the contract will no longer have any benefit in the contract, thus it is invalidated.

This is contrasted with the case where part of the capital perishes after mixing, in which case it perishes in the property of the partnership. Thus, if one of the partners trades in his capital, and the other’s perishes after that first dealing of the partnership, then they continue to share in ownership and profits. This follows since the conclusion of the partnership implies agency of each partner for the other.⁸

On the other hand, the Mālikīs and Ḥanbalīs ruled that the partnership is established as soon as the contract is concluded. Thus, if one partner’s capital

⁴ Al-Ḥāfiẓ Al-Zayla‘ī found this a very strange *Hadīth*, meaning that he did not find any chain of narration for it. However, some of the *Sunan* did list this *Hadīth* on the authority of ‘Alī (mAbpwh), c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.3, p.475).

⁵ Ibn Qudāmah (, vol.5, p.27), *Al-Muntaza‘ Al-Mukhtār* (vol.3, p.359), Mar‘ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.165).

⁶ Ibn Al-Humām ((Hanafi), vol.5, p.21), Al-Kāsānī ((Hanafi), vol.6, p.62 onwards), Al-Zayla‘ī ((Hanafi Jurisprudence), vol.3, p.318).

⁷ Ibn Juzayy ((Mālikī), p.284), ’Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.250), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.216), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.346).

⁸ Ibn Al-Humām ((Hanafi), vol.5, p.23), Al-Sarakhsī (1st edition (Hanafi), vol.11, p.167).

were to perish before mixing or dealing in any part of the capital, it would still perish in the property of all the partners.⁹

24.1.4 Dealing in the partnership's property

Each of the partners in a limited partnership (*sharikat 'inān*) is considered a legal agent for all the others. Hence, the Ḥanafīs and most of the Ḥanbalīs ruled that each partner may trade with any part of the partnership's capital in any form of trading, be it cash or credit. On the other hand, the Shāfi'īs and some of the Ḥanbalīs ruled that partners are not allowed to use the partnership's capital in credit sales.¹⁰

One exception is the case where one of the partners has no cash in possession (i.e. all of the partnership's capital is held in non-fungibles), and engages in a credit purchase. In this case, the credit purchase is considered a private dealing for the buying partner alone. This follows since otherwise the partnership would be incurring debt based on the partner's actions. In general, a partner does not have this right to put the partnership in debt, unless he gets an explicit permission to do so, in analogy to the active partner's inability to assume debt in a silent partnership (*mudāraba*). The reason for this ruling is that forcing such debts on the partnership is tantamount to forcing the other partners to contribute more to the partnership's capital than they had agreed to. This clearly cannot be effected without receiving the permission of those other partners.¹¹

In what follows, I shall enumerate some of the most important forms of dealings in which a partner may engage on behalf of the partnership:

1. The Ḥanafīs allow a partner to give the partnership's money to a person to buy goods at a specified price.¹² This follows since he is allowed to hire a person to trade in the partnership's capital in exchange for a wage, which is a more demanding contract. Also, the Ḥanafīs permit a partner to deposit the partnership's money. Both types of dealings are necessary for effective trading, and are therefore permitted by the Ḥanafīs.

On the other hand, the Shāfi'īs, did not permit those dealings, while the Ḥanbalīs were reported to have two opposing opinions with regards to giving money to another for trading.

2. Most Ḥanafi jurists agree that a partner may use the partnership's capital in a silent partnership (*mudāraba*). This follows from his legitimate ability to hire a worker on behalf of the partnership. In the latter case, the worker

⁹ Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.166).

¹⁰ Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.167), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.214).

¹¹ Al-Kāsānī ((Ḥanafī), vol.6, p.86), 'Ibn 'Ābidīn ((Ḥanafī), vol.3, p.377).

¹² Al-Dardīr ((Mālikī)A, vol.2, pp.352.521), Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.166). 'Ibn 'Ābidīn ((Ḥanafī), vol.3, p.377) states: this is the case where all profits accrue to the one supplying the capital and no profits are collected by the one who buys on the capitalist's behalf. The Shāfi'īs made the definition more explicit by stating that the one who trades on behalf of another in this case does it as a volunteer, c.f. Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.312), *Majma' Al-Damānāt* (p.313).

would deserve wages regardless of the business outcome. Thus, allowing the partner to engage in a *mudāraba* is better for the partnership since the active partner only collects if the business is profitable.

3. A partner may allow another to trade on the partnership as a legal agent (*wakīl*). This follows from the previous permission since agency to trade is simpler than engaging in a silent partnership. It is also made necessary by the fact that no merchant can perform all trading acts on his own, hence requiring agency in some sales.
 4. If a partner is authorized to engage in pawning activities, he may pawn the partnership's property in a credit sale, or collect pawned objects from credit buyers. This follows since the partner is allowed to pay the partnership's debts as well as collect its credits, and those are the roles played by pawned objects.¹³
 5. A partner may accept or initiate transfers of debts resulting from trading. Such debt transfers are necessary to facilitate trade, since it provides a means of ensuring payment of debts in a manner similar to pawned objects.
 6. Each partner must fulfill all obligations and collect all rights associated with contracts in which he engages. Thus, no partner is allowed to collect debts owed to another partner, and the debtor is allowed to insist to pay only to the one to whom he is indebted. Also, if one partner engages in a trade, the other one is not liable for the price, and he is not authorized to collect purchased items. Moreover, no partner has the right to represent another in a court of law, since legal disputes are among the rights associated with the contract.
 7. 'Abū Ḥanīfa, Muḥammad, the Mālikīs, and the Ḥanbalīs permitted a partner to travel with the partnership's capital. They base this ruling on the view that travel is part of the business, and the partnership exists irrespective of the location of the partners.
- On the other hand, 'Abū Yūsuf and Al-Shāfi'ī ruled that a partner may only travel with the partnership's capital if authorized by his partners. Their ruling is based on the view that travel exposes the partnership to risks that require prior consent of the partners.
8. No partner is allowed to give part of the partnership's property as a gift or charity. Moreover, since loans do not have an immediate compensation, they are also considered charitable payments, and thus no partner is allowed to lend the partnership's properties. In all such cases, no partner has the right to contribute another partner's property in charity.¹⁴

¹³Ibn Al-Humām ((Hanafi), vol.5, p.26), 'Ibn 'Ābidīn ((Hanafi), vol.3, p.378).

¹⁴Al-Sarakhsī (1st edition (Hanafi), vol.11, p.174), Al-Zayla'ī ((Hanafi Jurisprudence), vol.3, p.320), 'Ibn Al-Humām ((Hanafi), vol.5, p.25 onwards), Al-Kāsānī ((Hanafi), vol.6, pp.68-72), *Majma' Al-Damānāt* (p.298 onwards), 'Ibn 'Ābidīn ((Hanafi), vol.3, p.377 onwards), Al-Dardīr ((Mālikī)A, vol.2, p.352), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī),

The Shāfi‘īs summarize all of their restrictions thus: the partner may deal in any manner acceptable for a legal agent, i.e. in any manner that cannot harm the other partners. Thus, he may not sell with credit due to *gharar*, he may not trade in different currencies, cannot engage in grossly unfair trades, and cannot travel with the partnership’s money without permission. This follows in their view since the partnership is first and foremost a mutual agency of the partners for one another.

24.2 Unlimited capital partnerships

Limited partnerships (*‘inān*) are more general than unlimited partnerships. Therefore all the conditions that apply to a limited partnership (*sharikat al-‘inān*) apply by implication to unlimited partnerships (*sharikat al-mufāwadah*), and the same legal status rules that apply to the first apply to the second. However, there are specific conditions that apply only to unlimited partnerships:¹⁵

1. The partner in a *mufāwadah* can undertake debt on behalf of the partnership, as well as pawn objects on its behalf. This follows from each of the partners being a guarantor (*kafil*) for the other in this type of partnership.
2. Every partner is liable for all financial liabilities induced by his partners through valid sales, loans, leases, guarantees, and pawning, as well as guarantees for usurped objects and kept deposits and loans. All those responsibilities also follow from each partner being a guarantor for the others.
3. ’Abū Ḥanīfa ruled that each partner is responsible for any guaranty extended by any other partner, since guaranty is transitive. However, ’Abū Yūsuf and Muḥammad ruled that guaranties are charitable actions, for which the partners are not responsible. They provide proof for their ruling by the facts that young children are not allowed to act as guarantors and that a sick person’s guaranty is only good up to one-third of his estate.
4. Each partner is responsible for all trade-related obligations binding on his partner (including delivery of the goods, delivery of the price, returning defective merchandise, etc.).
5. However, a partner is not responsible for torts levied on his partners due to transgressing against another. A partner is not responsible for his partner’s dowry, alimony, or other debts caused by personal actions that do not relate to the partnership or its trading.

vol.6, p.43), ’Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.253), Mar‘ī ibn Yūsuf (1st printing (Hanbali), vol.2, p.167), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.214).

¹⁵ Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.203 onwards), Al-Ṭahāwī ((Ḥanafī), p.107), Al-Kāṣānī ((Ḥanafī), vol.6, p.72 onwards), ’Ibn Al-Humām ((Ḥanafī), vol.5, p.9 onwards), ’Ibn c-Ābidīn ((Ḥanafī), vol.3, pp.369,378), *Majma‘ Al-Damānāt* (p.197)

Any personal or family purchases of one of the partners (e.g. for buying a house, clothes, food, etc.) belong to him and are kept out of the *mufāwadah*. However, the seller of such goods may demand payment of the price from any of the partners. Thus, the ownership of those goods is private, but liabilities are shared based on the principle of mutual guaranty. The ruling based on reasoning by analogy would in fact make all those purchased goods part of the partnership properties.

24.3 Credit partnerships

Whether the credit partnership is limited (*'inān*) or unlimited (*mufāwadah*), the rights and obligations of the partners are the same as they are for the corresponding capital partnerships. Thus, the default form of partnership for them is limited partnership. However, if they stipulate that the partnership is unlimited, then they add guaranty to unlimited delegation and agency, then they must ensure equality of their shares, since that is required in unlimited partnerships.¹⁶

The Hanbalis permitted credit partnerships but restricted that permission only to limited credit partnerships. Thus, they do not permit unlimited partnership due to the inherent *gharar* that may result in one partner incurring a liability that he cannot afford.

24.4 Legal status of labor partnerships

24.4.1 Unlimited labor partnerships

An unlimited labor partnership entails that two or more workers equally share in performing a job, and equally share all profits, losses, and liabilities. If the labor partnership is unlimited (i.e. the term *mufāwadah* or some term to that effect is used), then all partners share the same liabilities. Thus any creditor for any of the partners may demand repayment from any of the other partners.¹⁷

24.4.2 Limited labor partnerships

In a limited labor partnership, each partner is still responsible for performing any job accepted by his partners. This is the ruling based on juristic approbation (*'isthsān*), which makes the limited partnership very similar to its unlimited alternative. According to this ruling, the commissioner of a job may demand its performance from any of the partners, and any of the partners may demand to collect the entire wages at the end. However, the ruling based on inference

¹⁶ Al-Kāsānī ((Hanafi), vol.6, p.77), 'Ibn 'Ābidīn ((Hanafi), vol.3, p.382), *Majma' Al-Damānāt* (p.303).

¹⁷ Al-Kāsānī ((Hanafi), vol.6, p.77), Al-Zayla'ī ((Hanafi Jurisprudence), vol.3, p.321), *Majma' Al-Damānāt* (p.302 onwards).

by analogy would limit each partner's rights and responsibilities in a limited partnership.

However, juristic approbation - which is adopted by the Ḥanafīs and Ḥanbalīs – is in fact a middle ground between the limited partnership and unlimited partnership views. In this regard, the limited labor partnership does indeed imply that each of the partners is responsible for the performance of any job agreed upon by one of them. However, this mutual guaranty only applies to the work aspects of the partnerships, and thus falls well short of a full-fledged unlimited partnership. Thus, the partners are not responsible for other types of debts incurred by one of the partners, since they did not specify that they had an unlimited partnership. Thus, each partner is a guarantor of the others only in aspects pertaining to work under the partnership.¹⁸ It is noteworthy in this regard that the Zaydīs went further to state that a limited labor partnership implied delegation and agency (*wakālah*), but no mutual guaranty (*kafālah*) of any kind.

24.4.3 Profit sharing

Profit shares in labor partnerships are determined according to legal liability and not according to the actual amount of work performed by each partner. Thus, even if only one of the partners were to perform all the work (say if the other is sick or traveling abroad), the wages would still be shared as stated in the contract. Thus, it is the guaranteee to perform the work that earns a partner his share in the wages, and not the actual work. Proof of this assertion is provided by the fact that the worker may in fact hire another to do the work on his behalf and still collect the full wages.

The partnership contract may specify unequal distribution of wages together with unequal distribution of liability for performing the work. Again, the unequal wage shares are justified by the initial inequality in liabilities, regardless of the actual shares in performed work.

24.4.4 Loss sharing

Losses in labor partnerships must be shared in proportion to the ratio of liabilities specified in the contract (e.g. that one of them will take two-thirds of the work and the other will take one-third). Thus, both profits and losses must be shared according to the same formula, which is equality to liability shares. In this regard, if losses are caused by a transgression of one of the partners, it is still shared by all partners according to the liability ratio, since they guarantee the work according to that ratio.¹⁹

¹⁸ Ibn Qudāmah (, vol.5, p.5).

¹⁹ Al-Kāsānī ((Ḥanafi), vol.6, p.76 onwards), Al-Sarakhsī (1st edition (Ḥanafi), vol.11, p.107 onwards), 'Ibn Al-Humām ((Ḥanafi), vol.5, p.29 onwards), 'Ibn 'Ābidīn ((Ḥanafi), vol.3, p.381).

Chapter 25

Contract Characteristics

25.1 Bindingness

The majority of jurists ruled that the partnership contract is permissible but non-binding.¹ Therefore, each partner retains the right to void the contract provided that the other partners are informed of its voiding. This follows from the fact that one may not terminate a agency without informing the agent, lest he incur losses unwittingly. Since partnership involves mutual agency, its termination requires informing the other partners.

The traditional Mālikī opinion, as stated in *Ibn-Rushd Al-Qurtubī* ((Mālikī)) and *'Ibn Rushd Al-Hafid* ((Mālikī)), was also that partnership contracts are non-binding. However, *Al-Kharshī* (1317H, 1st and 2nd editions (Mālikī)) suggests that the best accepted opinion among the Mālikīs renders such contracts binding, whether or not the properties of partners was in fact mixed. *'Ibn 'Abd Al-Salām* and *Sahūnūn* ruled that the contract is binding even if none of the partners had undertaken any transactions based on the partnership. On the other hand, *'Ibn Al-Qāsim* and *'Ibn Al-Hājib* and others ruled that the contract only becomes binding once one of the partners begins dealing or work under the partnership. In summary, most Mālikīs, as stated by *Al-Haṭṭāb* (1st edition (Mālikī)), ruled that capital partnerships are binding based on the contract, while labor or work partnerships only become binding by the commencement of work.

¹ Al-Kāṣānī ((Hanafi), vol.6, p.77), *'Abū-'Ishāq Al-Shirāzī* ((Shāfi'i), vol.1, p.348), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.215), *Ibn Qudāmah* (, vol.5, p.21), *'Ibn Rushd Al-Hafid* ((Mālikī), vol.2, p.253), *Al-Dardīr* ((Mālikī)A, vol.3, p.349), *Al-Haṭṭāb* (1st edition (Mālikī), vol.5, p.122), *Al-Kharshī* (1317H, 1st and 2nd editions (Mālikī), vol.6, p.39), *Al-Sharikāt fī Al-Fiqh Al-'Islāmī* by Dr. *'Alī Al-Khaffif* (p.49 onwards).

25.2 Nature of partner possession

Jurists agree that any partnership property in the possession of one partner is considered a trust, since he would thus hold it with his partners' permission. Thus, since the partner is not holding the partnership property to collect a price or to guarantee some other payment as in pawning, he is not responsible for the perishing of what is kept in his possession. Thus, the partner's possession of such property is considered holding by legal proxy on behalf of his partners, and if the property were to perish in his possession, he is not required to pay any compensation. In this regard, the partner's claims regarding profits, losses, and perishing of properties, are all accepted based on his oath. On the other hand, as in all trusts, he is still responsible to compensate the other owners if he destroys their property through negligence of transgression.²

²Al-Sarakhsī (1st edition (Hanafī), vol.11, p.157), Al-Zayla^{cī} ((Hanafī Jurisprudence), vol.3, p.320), 'Ibn Al-Humām ((Hanafī), vol.5, p.27), 'Ibn ^cĀbidīn ((Hanafī), vol.3, p.379), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'i), vol.1, p.347), 'Ibn Qudāmah (, vol.5, p.18), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.253).

Chapter 26

Invalid Partnerships

Certain factors or actions invalidate all types of partnerships, while others invalidate certain types only:

26.1 General invalidating conditions

We enumerate four actions or factors that invalidate any partnership:¹

1. If any of the partners dissolves a partnership, it becomes invalid. This follows from the non-bindingness of the partnership contract, as we have seen. We have also seen that the Mālikīs consider the contract binding, and thus ruled that the partnership may only be dissolved by mutual consent. The Ḥanbalīs allow each of the partners to terminate his partners' agency, in which case they no longer have the right to deal in his portion of the partnership property. They also allow unilateral dissolution of the partnership, in which case each partner is allowed access only to his own property.
2. If a partner dies, the partnership is dissolved, whether or not the other partners know of his death. This follows since the joint agency and delegation is terminated by death.
3. If one of the partners reverts from Islām and joins its enemies, his legal status is equivalent to death, and the partnership is dissolved.
4. If any of the partners loses his sanity, or goes into a coma, for an extended period of time (some Ḥanafīs said one month or more, while others said six months or more), then mutual agency is violated, and the partnership is dissolved.

¹ Al-Sarakhsī (1st edition (Hanafī), vol.6, p.78), Al-Zayla^{cī} ((Hanafī Jurisprudence), vol.3, p.320), 'Ibn Al-Humām ((Hanafī), vol.5, p.27), 'Ibn ^cĀbidīn ((Hanafī), vol.3, p.379), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'i), vol.1, p.347), 'Ibn Qudāmah (, vol.5, p.18), 'Ibn Rūshd Al-Hafid ((Mālikī), vol.2, p.253).

26.2 Specific invalidating conditions

The following is a list of events, actions, or factors, that invalidate specific types of partnerships:²

1. In a capital partnership, if one partner's capital perishes before any trading takes place, or if the entire capital of the partnership were to perish, the partnership is invalidated. In such cases, the object of the contract - the capital that is identified in the contract³ - would cease to exist, thus invalidating the contract in analogy to sales.

As we have seen previously, if only one partner's capital were to perish before mixing with the rest of the capital, the contract is invalidated since the other partners no longer gain any benefit from its existence. However, if the partner's capital were to perish after it is mixed with the rest, or if one of the partners had already begun trading on behalf of the partnership, then all the partners share in that loss.

However, in the case where one partner trades on behalf of the partnership out of his own capital, and then the capital of another partner perishes, jurists differed over ownership of the purchased item. Thus, Al-Hasan ibn Ziyād by ruled that the purchased items become joint property of the partners, and hence each partner may only sell his share in it. However, the better opinion is that of Muhammad, who ruled that any partner may sell the entire goods thus purchased, since the partnership is thus ruled to remain legally intact. Thus, he ruled that any partner may sell the goods on behalf of the partnership as a legal agent (*wakil*), and give the other partners their share of the price.

On the other hand, if one partner's capital were to perish, and later another partner trades out of his own capital, then the ruling depends on the language of their contract. Thus, if the partnership contract explicitly stipulated mutual agency (e.g. that any trade is shared among the partners), then the contract is given priority and the bought items are shared as joint property. However, if mutual agency (*wakālah*) was not explicitly mentioned in the contract, then the buyer is considered to have bought on his own behalf only. In the latter case, mutual agency is ruled to have

²ibid., 'Ibn Al-Humām ((Hanafi), vol.4, p.22), Al-Sarakhsī (1st edition (Hanafi), vol.11, pp.164,178), Al-Tahāwī ((Hanafi), p.107), Al-Zayla'ī ((Hanafi Jurisprudence), vol.3, p.319), 'Ibn 'Abidin ((Hanafi), vol.3, p.375).

³The Hanafis ruled that money becomes non-fungible through identification in partnerships, agency, trusts, gifts, bequests, and usurping; but do not get thus identified in commutative contracts or silent partnerships. The difference between regular partnerships and silent partnerships is the requirement in the former to specify the object of the contract, which is the capital. On the other hand, capital is only made non-fungible in silent partnerships after receipt by the entrepreneur. Thus, a silent partnership is not invalidated if the capital perishes prior to receipt, but it is invalidated if it perishes after receipt. In contrast, partnerships do not require receipt of the capital by partners, and hence would be invalidated as soon as the object of the contract perishes, c.f. *Al-Sharikāt fī Al-Fiqh Al-'Islāmī* by Dr. 'Alī Al-Khaffī (p.113).

been invalidated by implication once the partnership was invalidated.⁴

2. In an unlimited partnership, the Ḥanafīs ruled that any effected inequality in capital shares (e.g. if one of the partners receives a monetary inheritance) invalidates the contract. As we have seen, this follows from the Ḥanafīs' insistence on continued equality of capital shares in unlimited partnerships to justify equality of all rights and obligations as well as profit and loss shares. This rule is far-reaching: for instance, if one partner contributed capital in gold coins and the other contributed an equal amount of capital in silver coins, and if before any trading takes place the value of one type of coins were to increase relative to the other, then the unlimited partnership would be invalidated.

⁴Ibn Al-Humām ((Hanafi), vol.5, p.23), 'Ibn ʻAbidīn ((Hanafi), vol.3, p.376).

Chapter 27

Defective Partnerships

We have discussed the legal status of defective partnerships in previous chapters. In this chapter, we list the different types of partnerships that the Ḥanafis would render defective.

27.1 Utilization of public property

If two or more partners form a partnership to utilize public properties (e.g. hunting, fishing, grazing, etc.), and share their proceeds, the Ḥanafis render this a defective partnership. This ruling is based on the view that partnership requires mutual agency, which is not allowed in the utilization of public properties. Thus, each worker is considered to be working for himself, and he keeps the proceeds of his utilization of the public property. If the partners participated in collective utilization of the public properties, then the proceeds are divided equally among them.

However, if the workers utilize the public properties individually, then combine the output and sell it, then the proceeds are shared according to the weight or volume of what they collected individually. If the output was not measurable by weight or volume, then the proceeds are divided among them in ratio to the values of their respective generated output. Finally, if the weight, volume, or value is unknown, then each of them may collect an equal share or less based on his claim. However, if anyone demands more than an equal share, then he must have a material proof to support his claim.

If one worker did all the work but was assisted by another (e.g. one did all the fishing and another carried the fish for him), then the worker collects all the proceeds, and pays the helper the going market wage for what he did. In this case, no agreed-upon ratio of the proceeds can be justified, since the output was unknown. Thus, the worker collects the previously unknown proceeds, and pays the helper a fixed wage based on the market conditions. However, 'Abū Yūsuf ruled that the helper collects the market wage provided that it does not exceed half the output or its value. Thus, he ruled that the worker and helper implicitly

agreed to share the output equally, and the helper is thus not entitled to more than the named share, in analogy to other defective employment contracts.¹

As we have seen previously, most of the non-Ḥanafis, including most of the Shāfi‘īs, accept partnerships to utilize public properties as valid. This follows from their permission of agency (*tawqīl*) in utilizing such properties, which the Shāfi‘īs argued to be similar to agency in trade.²

27.2 Partnership in leasing

If two or more partners agree that each will lease his property, and they share the lease payments, the Ḥanafis render this partnership defective. This ruling is based on their view that agency (*wakālah*) to lease another’s property and collect a portion of the rent is not valid. However, if the partners were to combine their properties to perform a specific task (rather than lease the properties for a fixed period of time), then that would become a valid partnership and they may share the wages for performing this task. For example, if two car-owners lease their cars and they share the collective lease payments, that is a defective partnership, and each partner should keep the lease payment for his property. This is also the Shāfi‘ī opinion, based on the view that two separate usufructs were derived from two different properties, and the owners of those properties should each collect his property’s lease payment.³ However, if the two car owners jointly lease their cars for transporting a group of people a known distance, and share a fixed compensation, then that is a valid work partnership.⁴

27.3 Lease sharing

Also, if the owner of a property asks another to lease it on his behalf and they share the lease payments, that is considered a defective partnership. In this case the property’s owner should collect all of the rent, and the worker should collect the going market wage for his services.

27.4 Partnership in unreceived property

If a person asks another to be partners in property that the first bought but has not yet received, the partnership would be tantamount to selling half the

¹ Al-Zayla‘ī ((Hanafi Jurisprudence), vol.3, p.323), ‘Ibn Al-Humām ((Hanafi), vol.5, p.3 onwards), Al-Kasānī ((Hanafi), vol.6, p.63 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.11, p.216 onwards), ‘Ibn ‘Abidīn ((Hanafi), vol.3, p.382).

² Ibn Hubayrah ((Hanbali), p.205), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, pp.216,221), *Rawdat Al-Tālibīn* (vol.4, p.291), ‘Ibn Qudāmah (, vol.5, p.81), Al-Buhūtī (3rd printing (Hanbali), vol.3, p.452).

³ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.216).

⁴ Al-Samarqandī ((Hanafi), vol.3, p.19 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.11, pp.170,218 onwards), ‘Ibn ‘Abidīn ((Hanafi), vol.3, pp.383-385).

property to the potential partner. However, such a sale is not valid prior to receipt, and hence the partnership contract would be rendered defective.

However, if the buyer had in fact received the property prior to the initiation of the partnership, then the partnership contract is concluded and the new partner owes the buyer half the price. If the partner did not know the price prior to proposing the partnership, then he has an option once he knows the price: he may pay half the price and assume his share, or he may void the contract.

If a new individual joins a partnership of two or more, his default share in ownership may be determined in one of many ways. For instance, if two individuals jointly buy a horse, and a third wishes to join the partnership, his default share may be either one third or one half. The ruling by analogy to joining only one owner is that his share is one half. However, the ruling based on juristic approbation is that equality of shares is maintained, thus making his default share one third. On the other hand, the latter ruling still depends on the manner in which adding the new partner is effected. For instance, if one partner explicitly gives the new partner a share in his property and a share in his partner's property, then each of the original partners retains one-quarter ownership, and the new partner gets one half.

In all defective partnerships, any realized profits are divided in proportion to capital shares. Moreover, as we have seen in the legal status chapter, any condition to distribute profits shares in unequal shares different from capital shares is invalidated.⁵

⁵Ibn Al-Humām ((Hanafi), vol.5, p.33), 'Ibn 'Abidīn ((Hanafi), vol.3, p.383).

Part VII

Silent Partnership *(mudārabah)*

Preliminaries

The two main Arabic names given to this type of partnerships are *muḍārabah* (in the language of Iraq), and *qirād* in the language of Hijaz. The first name emphasizes that both the capitalist and the entrepreneur share in profits, while the second name emphasizes the fact that the capitalist gives part of his capital and part of his profit to the entrepreneur. The latter definition highlights the similarity between *qirād* and *'ijārah*, whereby the entrepreneur is entitled to a fraction of the profits based on his work.⁶

We shall cover the silent partnership contract in five chapters:

1. Definition, legality, cornerstones, and characteristics.
2. Conditions of silent partnership.
3. Legal status of silent partnership.
4. Disagreements between the capitalist and the entrepreneur.
5. Factors that invalidate a silent partnership.

⁶ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.309), 'Ibn Al-Humām ((Hanafī), vol.7, p.57 onwards), Al-Sarakhsī (1st edition (Hanafī), vol.22, p.18), Al-Zayla‘ī ((Hanafī Jurisprudence), vol.5, p.52), 'Ibn 'Abidīn ((Hanafī), vol.4, p.504), *Majma‘ Al-Damānāt* (p.303).

Chapter 28

Definition and Legality

28.1 Definition

In a silent partnership contract, the owner of capital gives it to a worker to trade on their behalf, and profits are shared according to an agreed-upon formula.¹ All financial losses are borne by the provider of capital (the silent partner, or the capitalist), while the entrepreneur can only lose his effort if no profits are made. The author of *Kanz Al-Daqā'iq* defined it as a partnership with one party providing capital and the other providing labor.

The first definition highlights two important distinctions between silent partnership (*mudārabah*) and other contract forms:

1. It is not valid to establish a silent partnership where the provided capital takes the form of a usufruct (e.g. the right to live in a house), or a debt on the entrepreneur or somebody else. The silent partner must “give” capital to the entrepreneur to establish the silent partnership.
2. The profit sharing arrangement establishes the difference between a silent partnership and a agency (*tawkīl*).

In a silent partnership, the silent partner deserves his share of profits as compensation for the use of his capital, and the entrepreneur deserves his share as a compensation for his effort, without which no profits would be realized. If the contract stipulated that all the profits accrue to the capitalist, then the contract is not a silent partnership, but it is considered a *mubāda'a* whereby the worker volunteers to trade on the capitalist behalf. At the other extreme, if the contract stipulates that all profits accrue to the entrepreneur, then the contract is a loan (*qard*).

¹ibid.

28.2 Legality of silent partnership

There is a consensus among jurists that silent partnership is permitted, and based their ruling on proofs from the Qur'ān, Sunnah, consensus of the Muslims, and ruling by analogy. The permissibility of this contract is viewed as an exception to general rules prohibiting excessive risk and uncertainty in hiring contracts.

Proofs are derived from the Qur'anic verses: “Others traveling through the land (yaqrībūna fī al-'ardī) seeking of Allāh's bounty” [73:20], and “and when the prayer is finished, then you may disperse through the land and seek of the bounty of Allāh” [62:10]. While those verses do not address the silent partnership contract explicitly, they implicitly validate working with others' capital in exchange for part of the profits.

Proofs in the Sunnah are derived from two *Hadīths*. The first is narrated on the authority of 'Ibn 'Abbās (mAbpwh): “Al-'Abbās ibn 'Abd Al-Muttalib used to stipulate a condition whenever he gave his money in a *mudāraba* that the entrepreneur will not take his money across any sea, into any valley, or buy any animal with a soft belly, and if the entrepreneur were to do any of those actions, then he must guarantee the capital. The Messenger of Allāh (pbuh) heard of this practice and permitted it”.² The second *Hadīth* was narrated by 'Ibn Mājah on the authority of Ṣuhayb (mAbpwh) that the Prophet (pbuh) said: “There is blessing in three transactions: credit sales, silent partnership, and mixing wheat and barley for home, not for trading”.³

Consensus on the validity of this contract (*'ijmā'*) was established by the tradition that a group of companions of the Prophet (pbuh) invested an orphan's money in a silent partnership, and nobody criticized their action.⁴ Moreover, it is narrated that 'Abd-Allāh and 'Ubayd-Allāh, both sons of 'Umar ibn Al-Khaṭṭāb (mAbpwt), while traveling with the army of Iraq, visited 'Abū Mūsā Al-'Ash'arī who worked for their father. He welcomed them and offered to help them. His offer was to give them some money he owed to the Muslim Treasury, they can use the money to buy goods in Iraq and sell them in Madīnah, keeping the profits, and giving the principal to their father. They did as he suggested, and when they came to their father, then the Commander of the Faithful, he was upset.

²Narrated by Al-Tabarānī in *Al-'Awsat*. However, Al-Haythamī said that its chain of narration contained 'Abū Al-Jārūd Al-'A'mā, who was a known liar, c.f. Al-Haythamī (, vol.4, p.161).

³This *Hadīth* has a weak chain of narration, c.f. Al-Ṣan'ānī (2nd printing, vol.3, p.76). In fact, Ibn Hazm in was right to say in *Marātib Al-'Ijmā'*: “All chapters of Islamic jurisprudence have a foundation in Qur'ān or Sunnah, except for silent partnership, for which we found no foundation in them. The contract is - in fact - legitimized by consensus of jurists, especially since it did exist during the Prophet's (pbuh) time, and he permitted it to continue. Otherwise, this contract would not have been permitted”, c.f. 'Ibn Hajar (, p.255).

⁴Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Hadīth), vol.4, p.113).

He asked them if 'Abū Mūsā had given similar capital to all other soldiers, and they said no. He then got angry and said: "You are the two sons of the Commander of the Faithful, and thus he lent you the money to make a profit?". Then, "Ubayd Allāh said: "O Commander of the Faithful, had the money perished, we would have guaranteed it!", but "Umar (pbuh) insisted that they not keep any of the profit. When "Ubayd Allāh reiterated his argument, one of those present said: "O Commander of the Faithful, perhaps you can make it a *qirād* (i.e. if you give them half the profit, and put the other half in the Treasury), and "Umar consented to that arrangement.⁵

Moreover, 'Ibn Taymiya established the legality of *mudāraba* through consensus that is based on a Legal Text. He thus argued that the contract was commonly used by the Prophet's tribe in pre-Islamic times. In this context, the Prophet (pbuh) himself traveled to trade with other people's money including that of the Lady *Khadījah* (mAbpwh), and most of the caravans of 'Abū Sufyān were financed through *mudāraba*. When Islām came, the Prophet (pbuh) continued to approve of the contract, and his own companions continued to use it with his implicit approval. In this regard, the Sunnah includes the Prophet's (pbuh) words, actions, and all practices that he approved. This establishes that *mudāraba* has a foundation in Sunnah.⁶

The contract is also established through reasoning by analogy to crop sharing. Both contracts are allowed to permit those who possess property but lack the time and skill needed to make profits, and those who possess the time and skill but no property, to collude in a productive contract. In this regard, all legal contracts were made thus by Allāh (swt) to effect economic benefits to their parties.⁷

28.3 Cornerstones and types of *mudāraba*

The Hanafīs list corresponding offer and acceptance as the cornerstone of silent partnership. The offer language must use one of the common Arabic terms for this contract (*mudāraba*, *qirād*, *muqārada*, *mu'āmala*), or any language that implies the essence of the contract.⁸ Jurists of the other schools list three cornerstones for the contract: (i) capitalist and entrepreneur/worker, (ii) object

⁵Narrated by Mālik in *Al-Muwatta'* on the authority of Zayd ibn 'Aslam on the authority of his father. This narration was then reiterated in Al-Shāfi'i's *Musnad* and Al-Bayhaqī in *Al-Ma'rifah*. It was also narrated by Al-Dāraqutnī in his *Sunan* on the authority of 'Abdullah ibn 'Aslam on the authority of his father and grandfather, c.f. Al-Suyūtī (b, vol.2, p.173), Al-Hāfiẓ Al-Zayla'i (1st edition, (Hadīth), vol.4, p.113), 'Ibn Hajar (, p.254).

⁶'Ibn Taymiyah ((Hanbalī), vol.19, p.195 onwards).

⁷Al-Kāsānī ((Hanafī), vol.6, p.79), 'Ibn Al-Humām ((Hanafī), vol.7, p.58), Al-Sarakhsī (1st edition (Hanafī), vol.22, p.18), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.384), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.309).

⁸Al-Kāsānī ((Hanafī), vol.6, p.79 onwards).

of the contract (capital, work, and profit), and (iii) contract language (offer and acceptance). The Shāfi‘īs counted item (ii) as three cornerstones, thus counting five cornerstones in all.⁹

There are two types of silent partnerships:¹⁰

28.3.1 Unrestricted silent partnership

In this case, the capitalist gives the entrepreneur a certain amount of money, specifying only the profit sharing rule. Thus, he leaves unspecified the work to be done, its time and place, etc.

28.3.2 Restricted silent partnership

In this contract, the capitalist specifies a list of conditions relating to the work. Jurists differed over the conditions or constraints that are permissible for this type of silent partnership:

- ’Abū Ḥanīfa and ’Aḥmad ’Ibn Ḥanbal permitted the specification of a time-framework for the work to be done, and also permitted that the entrepreneur be restricted to dealing with a particular person in all trades. However, Mālik and Al-Shāfi‘ī deemed both of those sets of restrictions impermissible.
- ’Abū Ḥanīfa and ’Aḥmad ’Ibn Ḥanbal permitted concluding a contract with a later starting date (e.g. “take this money and begin work next month”), while Mālik and Al-Shāfi‘ī rendered such delays impermissible.
- The Ḥanbalīs and Zaydīs permitted suspending a silent partnership on a condition (e.g. “when so-and-so delivers his debt to me, take the money and work on our behalf”). However, the Hanafīs, Mālikīs, and Shāfi‘īs rendered such suspension impermissible. Their proof is that silent partnership implies ownership of a portion of the profits, and such ownership may not be suspended pending a condition.¹¹

The Mālikīs and Shāfi‘īs actually require all silent partnerships to be fully unrestricted. Thus, they do not allow the capitalist to restrict the contract to a specific profession, working in a specific location, working with a specific person, or working within a specified time period. If a period were indeed specified, then if the entrepreneur fails to complete a trade within that time period, the contract is deemed defective. On the other hand, if the entrepreneur had an opportunity to make a profit, then the contract remains intact.

⁹Al-Kāṣānī ((Hanafi), vol.6, p.87).

¹⁰Al-Khaṭib Al-Shirbīnī ((Shāfi‘ī), vol.2, p.310), Al-Kāṣānī ((Hanafi), vol.6, pp.87-98).

¹¹Al-Shāfi‘ī ((Shāfi‘ī), vol.2, p.92), Al-Kāṣānī ((Hanafi), vol.5, pp.62-63), *Al-Muntaza* & *Al-Mukhtār* (Zaydī, vol.3, p.320), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.386), Al-Dardīr ((Mālikī)A, vol.3, p.521), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.173), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.497).

28.4 Characteristics of silent partnerships

Jurists agree that the silent partnership contract is non-binding prior to commencement of the work, and may thus be dissolved by either party. However, if the worker had already begun his work, jurists differed over the characterization of the contract:

- 'Abū Ḥanīfa, Al-Shāfi'i, and 'Ahmad 'Ibn Hanbal ruled that the contract would still be non-binding. Thus either party has the right to dissolve the contract at any time. As a consequence, they also ruled that the silent partnership contract is not inherited if one of its parties were to die.
- On the other hand, 'Imām Mālik ruled that once the work begins, the contract becomes binding on both parties. As a consequence, he also ruled that the contract would be inherited by the heirs of either party if he were to die after work had begun, but before the contract's expiration.
- Mālik based his opinion on the view that once work begins, dissolving the contract would lead to losses. On the other hand, the others ruled that silent partnership essentially involves dealing with the property of another with his permission. Seen thus, it is not binding whether or not the work had begun, and either party may dissolve it in analogy to the deposit (*wadi'ah*) and legal representation (*wakālah*) contracts.¹²
- The group of jurists who support both parties' right to void the contract maintain that the other partner must always be informed of the contract's dissolution, as they ruled for all other contracts.

Moreover, the Ḥanafis ruled that dissolution of the contract is only valid if the partnership's capital is held in monetary form, otherwise it is invalid. On the other hand, the Shāfi'is and Ḥanbalis permit dissolving the partnership when the capital is held in non-monetary form, provided that the two parties agree to sell it or divide it among themselves. They also ruled that if the entrepreneur requested selling the capital, the capitalist is forced to sell so that the entrepreneur may collect his rightful share of profits.¹³

Multiple capitalists, multiple workers, and contemporary corporations

Having multiple workers in a silent partnership is permitted, where the multiple workers implicitly form a work partnership within the silent partnership with

¹²Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.237), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.223), Al-Kāsānī ((Hanafī), vol.6, p.109), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.388), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.319), 'Ibn Qudāmah (, vol.5, p.58).

¹³ibid.

the capitalist. Thus, the Mālikīs ruled that the profit share earned by the workers would be distributed among them according to work, in the same manner stipulated for labor partnerships.¹⁴

Contemporary corporations may be viewed as variations on the classical silent partnership, which was studied in Islamic jurisprudence. Thus, in a modern joint liability company the partners share in capital ownership, while some of them work as active partners working on behalf of the silent partners. In limited partnerships, the partners who have limited liability are considered the silent partners, and the company's business is viewed as work on behalf of those silent partners. In particular partnerships, one partner is entrusted with the capital to invest on behalf of the others, who are considered silent partners in a *mudāraba*.

The same is true for an association of capital or a joint stock company, where the stock holders are considered silent partners, and the company works on their behalf. Professor ʻAlī Al-Khayfī also argued that any limited liability company with less than fifty partners is considered a silent partnership, with the manager being viewed as the entrepreneur.¹⁵ However, a more accurate characterization of the manager renders him an employee who works for wages. In this regard, there is no harm in joining a partnership and an employment contract in stock and joint liability companies, since the prohibition of "two contracts in one" does not apply if having the two contracts cannot lead to legal dispute. Since joining those two contracts has become conventional, it does not lead to legal dispute, and hence the joining of those two contracts does not constitute a defective condition. We shall return to this topic shortly.

¹⁴ Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.217).

¹⁵ *Al-Sharikāt fī Al-Fiqh Al-'Islāmī* (pp.92-97).

Chapter 29

Silent Partnership Conditions

The validity conditions for silent partnership may pertain to the parties of the contract, to its capital, or to the resulting profit.

29.1 Conditions pertaining to partners

The capitalist and the active partner (entrepreneur) must both be eligible for initiating a agency (*tawkil*) and acting as a legal agent (*wakīl*), respectively. In this regard, it is not necessary for both partners to be Muslim. Thus, partnerships are permitted between Muslims and Christians, Jews, or any other citizen of a Muslim country. However, the Mālikīs consider having a partnership with a Christian or Jew reprehensible if he does not engage in forbidden dealings (e.g. *ribā*), [and forbidden otherwise].

29.2 Conditions pertaining to capital

29.2.1 Must capital be monetary?

Jurists are unanimous in allowing money as capital in a silent partnership. The majority of jurists do not allow non-monetary property as capital in such partnerships, and the Ḥanafīs and Ḥanbalīs went further to reject even the use of fungible non-monetary goods as capital. Two notable exceptions are 'Ibn 'Abī Laylā and Al-'Awzā'ī, who permitted the use of such non-monetary properties as capital, ruling that the contract is thus concluded for the value of those properties at contract time.

The majority of jurists ruled against the use of non-monetary capital in silent partnerships based on *gharar*. Thus, they argue that the initial value of the capital can only be estimated, thus rendering the amount of profit uncertain.

This can lead to disagreements over the division of final wealth between principal capital and profits, thus leading to legal disputation. Thus, the contract is rendered defective, and the worker must be compensated with the going market wage for his work.¹ For the Mālikīs, this ruling differs from their opinion in limited partnerships (*sharikāt al-^cinān*), where they allowed the use of non-monetary capitals. The difference in their view is that silent partnership is an exception to the general prohibition of *gharar*, and hence may only be used subject to its explicit conditions, without resort to reasoning by analogy.

On the other hand, 'Abū Ḥanīfa, Malik, and Ibn Ḥanbal permitted listing the price of non-monetary property as the capital of a silent partnership. In this case, the capitalist would give said property to the entrepreneur, and instruct him to sell them and use the price as capital for their partnership. They ruled that the capital in this case is not the property, but its monetary price. On the other hand, Al-Shāfi'i did not permit this contract, since the capital is thus specified as the property's price, which is unknown. In this regard, a partnership may not be established with an unknown capital.

In general, jurists render a form of capital valid for silent partnerships if they render it valid for general partnership, otherwise, they rendered it invalid. Thus, the juristic differences over gold and silver dust or nuggets, copper coins, etc., which discussed in the previous part apply equally to the capital of a silent partnership.

29.2.2 Must the capital be present?

Jurists agree that the capital of a silent partnership may not be absent, and may not be a debt on the entrepreneur. In this regard, the requirement is presence of the money at the time the entrepreneur needs to use it, not at the contract time. Thus, if the money or debt is delivered to the capitalist, and it is then given to the entrepreneur in time, the partnership would remain valid.

Thus, if a creditor instructs the debtor to use the money as capital in a silent partnership between them, the contract is rendered defective. In this case, the money in the possession of the debtor still belongs to the creditor, and thus receipt of the capital to initiate the partnership would have never occurred.² In this case, 'Abū Ḥanīfa, the Mālikīs, the Shāfi'iis, and the Ḥanbalīs ruled that if the debtor traded with the money, then all his trading would be his, including any profit or loss, and the debt remains intact. This ruling is derivative of the more general ruling that it is impermissible to make a debtor a legal agent in

¹ Al-Sarakhsī (1st edition (Hanafi), vol.22, p.33), Al-Zayla^cī ((Hanafi Jurisprudence), vol.5, p.53), Al-Kāsānī ((Hanafi), vol.6, p.82), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.234), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'i), vol.1, p.385), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.310), 'Ibn Al-Humām ((Hanafi), vol.7, p.58), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, pp.203-209), Al-Dardīr ((Mālikī)A, vol.3, p.518 onwards), 'Ibn Juzayy ((Mālikī), p.282).

² Al-Kāsānī ((Hanafi), vol.6, p.83), 'Ibn Al-Humām ((Hanafi), vol.7, p.59), 'Ibn ^cAbidīn ((Hanafi), vol.4, p.506), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.335), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.310), 'Ibn Qudāmah (, vol.5, p.67), Al-Buhūtī (3rd printing (Hanbalī), vol.2, p.263), 'Ibn Juzayy ((Mālikī), ibid.), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, pp.202,204).

trading (with the debt money) on behalf of the creditor.

In contrast, 'Abū Yūsuf and Muḥammad ruled that any trading the debtor makes in this case is deemed to be on behalf of the creditor. They base this ruling on their view that agency is permitted in this case, where the debtor is released of the debt and trades on behalf of the creditor. However, the silent partnership is still rendered defective in their view, since the capital in this partnership would in fact be the non-monetary goods first bought by the debtor on behalf of the creditor.

On the other hand, all jurists agree that a capitalist may commission an agent to collect his debts from a third party and use them as capital in their silent partnership. In this case, the capital is designated as the specific money collected from the debtor, and the entrepreneur is at first a legal agent entrusted with the money, and he is considered to be in receipt of the capital with the capitalist's permission.

Similarly, the Ḥanafīs, Shāfi'īs, and Ḥanbalīs ruled that if a person is entrusted with a deposit, then the depositor may ask him to use the money as capital in a silent partnership between them. The difference between this case and that of the debtor is the view that the debtor would not be considered in receipt of the capital unless he pays it back to the creditor and then collects it with his consent. However, the Mālikīs ruled that pawned and deposited monies were too similar to debts, and thus do not qualify as capital in a silent partnership.

All jurists also agreed that usurped money may be used as capital in a silent partnership. In this case, the money belonged to the capitalist, and thus he may give the usurper permission to use it, thus implicitly delivering it to him.³

29.2.3 Capital must be delivered to the entrepreneur

The majority of jurists with the exception of the Ḥanbalīs ruled that the capital must be delivered to the entrepreneur for two reasons: (i) to enable him to work, and (ii) to establish the capital as a trust in his possession, which requires delivery in analogy to deposits. Thus, the majority ruled that silent partnership is not valid if the capitalist keeps the capital in his possession, unless the worker himself sought the capitalist's help in performing the work. This ruling is based on the view that the entrepreneur must have full flexibility in using the capital, which requires being in possession. However, the Ḥanbalīs permitted the capitalist to stipulate a condition that he keeps the capital in his possession. Also, the Mālikīs permitted the entrepreneur to request help from the capitalist, and permitted the capitalist to make multiple contributions to the capital of a silent partnership.

The condition of delivery of the capital to the entrepreneur differentiates silent partnerships from regular capital partnerships, where each partner may keep his capital in his possession. The difference between the two contracts is

³Al-Kāsānī ((Hanafī), vol.6, p.83), 'Ibn Qudāmah (, vol.5, p.68 onwards), 'Abū-'Ishāq Al-Shīrāzī (Shāfi'ī), vol.1, p.385), Al-Khatīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.310).

that a silent partnership is built on the contribution of capital by one partner and work by the other. In most cases, the worker may only begin to work after receiving the capital from his partner. On the other hand, a condition of delivering the capital in a capital partnership would be equivalent to a condition that the capitalist work in a silent partnership. Both such conditions would be contrary to the nature of the respective contracts, and would thus render them defective.⁴

This restriction applies whether or not the owner of the capital is himself a party in the contract. Thus, if a legal guardian invests a minor's money in a silent partnership, it is not permissible to stipulate that the minor should participate in the work.⁵ Also, if one of two partners in a capital partnership invests some of the partnership's money in a silent partnership, the contract may not include a condition that the other partner (who is a part owner) participate in the work. In those cases, delivery of the capital to the entrepreneur would not be effected, thus rendering the silent partnership defective.⁶ Another consequence of this rule is that the entrepreneur in a silent partnership may not use part of the capital to engage in a silent partnership in which the first capitalist is the worker. In that case, the first silent partnership remains intact, while the second one is rendered defective.

29.3 Conditions pertaining to profits

29.3.1 Profit ratios must be known

The entrepreneur enters into a silent partnership seeking his share of profits. Thus, this integral part of the contract must be known, otherwise the contract would be rendered defective.⁷ If a silent partnership contract is concluded without specifying the capitalist and entrepreneur ratios in profits, then the default ruling is that they divide the profits equally between them. This ruling follows from the view that equality is the default rule of division in partnerships, as shown in the verse: "But if more than two, they share in a third" [4:12].

⁴Of course, the capitalist may volunteer to work in a silent partnership, but if his work is stipulated as a condition, the contract would be defective, c.f. *Al-Sharikāt fī Al-Fiqh Al-Islāmī* by Dr. ʻAlī Al-Khaṭīb (p.70).

⁵However, jurists agree that it is permissible to stipulate a condition that the guardian himself, who is not the owner, participate in the work, *ibid*.

⁶Al-Sarakhsī (1st edition (Hanafi), vol.22, p.83 onwards), Al-Zayla^{cī} ((Hanafi Jurisprudence), vol.5, p.56), Al-Kāsānī ((Hanafi), vol.6, p.84 onwards), 'Ibn Al-Humām ((Hanafi), vol.7, p.63), 'Ibn ʻAbidīn ((Hanafi), vol.4, p.506), Al-Khaṭīb Al-Shirbīnī ((Shāfi^{cī}), vol.2, p.310), Al-Buhūtī (3rd printing (Hanbali), vol.2, p.262), Al-Dardīr ((Mālikī)A, vol.3, p.502 onwards), Al-Ramlī ((Shāfi^{cī}), vol.4, p.163), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, pp.210,212).

⁷Al-Sarakhsī (1st edition (Hanafi), vol.22, p.27), Al-Kāsānī ((Hanafi), vol.6, p.85), Al-Zayla^{cī} ((Hanafi Jurisprudence), vol.5, p.55 onwards), 'Ibn ʻAbidīn ((Hanafi), vol.4, p.505), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.334), Al-Khaṭīb Al-Shirbīnī ((Shāfi^{cī}), vol.2, p.313), 'Abū-'Ishāq Al-Shirāzī ((Shāfi^{cī}), vol.1, p.385), 'Ibn Qudāmah (, vol.5, p.30), Al-Ramlī ((Shāfi^{cī}), vol.4, p.162), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.209).

Defective conditions

The Ḥanafīs distinguish between two types of defective conditions in silent partnerships:⁸

- Conditions that result in ignorance regarding profit sharing would render the contract defective, as seen above. An example of such conditions would be a silent partnership with a stipulated condition that the entrepreneur should let the capitalist live in his house for a period of time. In this case, the entrepreneur's share of profits would contain a rent portion, rendering the profit share in compensation for his work unknown, and the contract becomes defective.
- However, if the defective condition does not affect knowledge of the profit shares, then the condition is invalidated, and the contract remains intact. For instance, if the contract has a condition that the entrepreneur would share in the capitalist's financial losses, that condition would be invalidated, and all financial losses would still be incurred by the capitalist.

More generally, the Ḥanafīs ruled that if a condition leads to violations of a validity condition of a silent partnership, the entire contract is rendered defective. On the other hand, any defective condition that does not affect the validity conditions becomes nugatory, and the contract remains intact.

Extreme profit shares

Jurists agree that if the contract specifies that the capitalist gets all of the profits, and the entrepreneur works for free, then the contract is not a silent partnership (*mudāraba*), and it is considered a *mubāda^ca* (uncompensated agency in trade). The Ḥanafīs also permitted the specification of a ceiling monetary amount for one of the partners (i.e. that partner gets a profit share or \$x, whichever is larger).⁹

However, jurists differed over the status of silent partnerships where

- The Ḥanafīs and Hanbalīs consider silent partnerships in which the entrepreneur gets all the profits a loan (*qard*). In this regard, they ruled that the contract cannot be validated as a silent partnership, and it is in fact equivalent to a loan, hence it should be treated thus.¹⁰ This is similar to their ruling that if the capitalist were to collect all of the profits, the contract would be treated as a *mubāda^ca*.¹¹
- The Shāfiīs consider the contract in this case a defective silent partnership, and rule that the worker should collect only the going market wage for his work.

⁸ Al-Ķāsānī ((Hanafi), vol.6, p.86), 'Ibn Al-Humām ((Hanafi), vol.7, p.62).

⁹ *Al-Sharikāt fi Al-Fiqh Al-'Islāmī* by Dr. 'Alī Al-Khaṣif (p.71).

¹⁰ Al-Ķāsānī ((Hanafi), ibid.), Al-Khaṭīb Al-Shirbīnī ((Shāfiī), vol.2, p.312), 'Abū-'Ishāq Al-Shirāzī ((Shāfiī), vol.1, p.385), 'Ibn Qudāmah (, vol.5, p.30).

¹¹ Al-Ķāsānī ((Hanafi), vol.6, p.87).

- The Mālikīs permit any profit ratio, including both extremes in which the entrepreneur or the capitalist gets all the profit. In the case where the entrepreneur gets all the profits, they ruled that the contract is in fact a loan, and the worker should thus guarantee the capital.¹²

29.3.2 Partner profits must be common shares

The profit shares of the partners must be specified as common shares (e.g. known ratios or percentages) of the overall profits of the partnership. As we have seen previously, this is an exception to the general prohibition of unknown wages in hiring contracts. Thus, while wages in a hiring contract must be specified as a fixed amount of money, profit shares in a silent partnership must be specified as proportions of overall profits. The difference between the two compensation schemes serves an important economic end. In this regard, the entrepreneur in a partnership agrees that his compensation will be a part of the accrued profits, which means that those profits cannot be fixed *ex ante* since there is no guaranteee that profits will be generated in fact.

This rule was summarized by 'Ibn Al-Mundhir, who said that all the jurists he knew ruled that a silent partnership is invalid if either party is guaranteed a fixed monetary compensation. An interesting special case to consider in this regard is the fixed interest rate banks pay for deposits, which thus invalidates the consideration of this contract as a silent partnership. Another interesting special case that is commonly used today, but cannot qualify as silent partnership, is the practice of paying workers a fixed wage plus a share in the profits when the company is liquidated.

It is also not permissible to establish a silent partnership wherein the entrepreneur is entitled to a profit share from other economic activities. Moreover, it is not permissible to promise one partner a profit share that is \$x more than the other's, since the entire generated profit may not exceed \$x. If any of those conditions were stipulated, the partnership is defective and the worker is only entitled to the going market wage for his work. On the other hand, if such increases in profit shares were not stipulated as conditions, the Mālikīs ruled that the two parties may mutually agree on any compensation scheme after the fact.¹³

¹²Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.335), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, pp.203,209).

¹³Al-Sarakhsī (1st edition (Hanafi), vol.22, p.27), Al-Zayla^{cī} ((Hanafi Jurisprudence), vol.5, p.54), Al-Kāsām ((Hanafi), vol.6, p.85), 'Ibn Al-Humām ((Hanafi), vol.7, p.60), *Majma^c Al-Damānāt* (p.303), Al-Dardīr ((Mālikī)A, vol.3, p.517), Al-Khaṭīb Al-Shirbīnī ((Shāfi^{cī}), vol.2, p.313), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.234), 'Ibn Qudāmah (, vol.5, p.34), Al-Ramlī ((Shāfi^{cī}), vol.4, p.165).

Chapter 30

Legal Status

A silent partnership may be valid or it may be defective. I shall first discuss the legal status of defective silent partnerships, and then discuss the legal status of valid silent partnerships.

30.1 Defective silent partnerships

A silent partnership is rendered defective if one of its validity conditions is violated. For instance, if a fisherman tells another: “Use my net for fishing, and we share the profits”, then the contract is not a valid silent partnership, since the net does not qualify as capital in such partnerships. Thus, the Ḥanafis, Shāfi‘īs, and Ḥanbalīs ruled that the capitalist and entrepreneur are not bound to observe the rules of silent partnership. In this case, all profits or losses accrue to the “capitalist” (owner of the net), and the worker should be paid the going market wage for his work, in analogy to defective hiring contracts. If the “capital” (net) were to perish in this case, the entrepreneur’s claim is accepted if he supports it with an oath, since the property is considered a trust in his possession whether or not the silent partnership is valid.¹

Thus, the Shāfi‘īs and Ḥanbalīs agreed with the Ḥanafi rules for defective silent partnerships, ruling that all profits and losses accrue to the capitalist, and the worker must be paid the going market wage. They expanded on those rulings, first by noting that the entrepreneur is still entitled to work with the capital he received, since the capitalist’s permission is still valid despite the invalidity of the contract. Unlike sales where the buyer may not deal in the property if the contract is invalid, such dealing is permitted in the invalid silent partnership since the entrepreneur is authorized by the capitalist’s permission, rather than by ownership of the capital. Second, they expanded on the ruling

¹ Al-Kāṣānī ((Ḥanafī), vol.6, p.108), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.315), ’Ibn Al-Humām ((Ḥanafī), vol.7, p.58), Al-Taḥāwī ((Ḥanafī), p.124), Al-Sarakhsī (1st edition (Ḥanafī), vol.22, p.22), *Majma‘ Al-Damānāt* (p.311), Mar‘ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.179), *Al-Farā’id Al-Bahiyya fī Al-Qawā‘id Al-Fiqhiyya* by Shaykh Maḥmūd Ḥamza (p.156).

that the worker should be paid the going market wage, but explaining that the going market wage is thus used as the value of the worker's labor. Thus, the entrepreneur is viewed to have worked in a defective contract, and the capitalist would have received that labor and it can no longer be returned to the worker. Thus, in analogy to a defective sale where one of the compensations perishes and cannot be returned, it must be compensated for in value, which is the equivalent of the going market wage in our case.²

Mālikī rulings

On the other hand, the Mālikīs postulated a different approach to this problem. Instead of always using the concept of "the going market wage" as compensation to the worker, they used the concept of "the standard silent partnership" for compensating both parties in many cases. When the standard silent partnership solution is used, the entrepreneur gets a portion of the profits if some are generated, and gets nothing if the work did not produce any profits.³ The fundamental difference between the standard silent partnership solution and the going market wage solution is due to making the compensation tied to profits in the first case, and making it a liability on the capitalist in the second case.⁴

In what follows, we consider some of the most important cases in which the standard silent partnership and going market wage solutions are used:

- The Mālikīs ruled that the standard silent partnership solution must be used in the following cases:
 - If the delivered capital was non-monetary.
 - If the profit ratios are unknown, with no conventional defaults available.
 - Time-constrained silent partnership (e.g. "use this money for a year").
 - Deferred silent partnership (e.g. "begin working with this money a year from now").
 - If the contract contained a condition that the entrepreneur guarantees the capital against all losses (including those that are not due to negligence or transgression).
 - If the capitalist ordered the entrepreneur to make a credit sale, but he made a cash sale instead, then the entrepreneur is considered to be trading for himself and all profits and losses accrue to him. In this case, the cash price is considered a loan extended from the capitalist to the entrepreneur.

²Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.315), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.388), 'Ibn Qudāmah (, vol.5, p.65).

³Al-Dardir ((Mālikī)A, vol.3, p.519 onwards), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.240), 'Ibn Juzayy ((Mālikī), p.282), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, pp.205-208).

⁴'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.241), Ibn-Rushd Al-Qurtubī ((Mālikī), vol.3, p.14).

- If the capitalist asked the entrepreneur to buy goods that are usually unavailable.
- If the two parties disagreed over profit shares after the work is done.
- On the other hand, the Mālikīs ruled that the going market wage for the worker's labor is established as a liability on the capitalist, independent of profitability or lack thereof, in the following cases:
 - If the capital is specified as a deposit or debt that the entrepreneur owes the capitalist, and which the capitalist had not received.
 - If a condition is stipulated that the capitalist must participate in the work.
 - If a condition is stipulated that the entrepreneur must get the capitalist's approval for all transactions.
 - If the capitalist commissions an inspector to observe the entrepreneur's conduct.
 - If the capitalist stipulates a condition specifying the exact tasks that the entrepreneur must perform.
 - If the capitalist stipulates that the entrepreneur must work with another specific person.
 - If the capitalist stipulates that the entrepreneur must combine the capital of another silent partnership with the capital he gives him.
 - If the capitalist asks the entrepreneur to use part of the partnership's money to trade voluntarily on his behalf with no compensation.

30.2 Valid silent partnerships

There are many aspects of the legal status of valid silent partnerships. In what follows, we discuss the legal status of the entrepreneur's possession of the capital, the entrepreneur's actions, and compensations to the entrepreneur and capitalist.

30.2.1 Entrepreneur possession of the capital

The major jurists of all juristic schools agreed that the entrepreneur in a silent partnership receives the capital with the capitalist's permission. Thus, his possession of the capital inherits the legal status of all deposits thus received.⁵

⁵ Al-Tahāwī ((Hanafi), p.124), 'Ibn Al-Humām ((Hanafi), vol.7, [.58]), Al-Kāsānī ((Hanafi), vol.6, p.87), Al-Sarakhsī (1st edition (Hanafi), vol.22, p.19), *Majma' Al-Damānat* (p.303 onwards), Al-Dardīr ((Mālikī)A, vol.3, p.536), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.234), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, pp.213,223), Al-Khatīb Al-Shirbīnī ((Shāfi'i), vol.2, p.322), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'i), vol.2, p.388), 'Ibn Qudāmah (, vol.5, p.69), Al-Zayla'ī ((Hanafi Jurisprudence), vol.5, p.53), 'Ibn Juzayy ((Mālikī), p.283), Mar'ī ibn Yūsuf (1st printing (Hanbali), vol.2, pp.171,178).

Moreover, when the entrepreneur trades in the partnership's capital, he does so as a legal agent of the capitalist, with all the appropriate rules applying to his trading.

Then, if the entrepreneur realizes some profits, he becomes a partner with his share in those profits. In this regard, the entrepreneur earns his share of profits as compensation for his work, while the capitalist earns the other share as growth in his property. As we have seen previously, if a validity condition of the contract is violated, then the partnership becomes defective, and the entrepreneur is considered a hired worker who must be paid the going market wage for his work.

If the entrepreneur deviates from the capitalist's condition in a valid contract, then he is considered a usurper, and he must guarantee the capital. However, if the capital perishes for reasons other than neglect or transgression, then the entrepreneur does not compensate the capitalist, since he is thus considered a trustee. As we have seen, if the entrepreneur incurs losses, they are borne by the capitalist exclusively. On the other hand, if the entrepreneur makes a profit, he should be first to collect his share.

Jurists differed over the legal status of the contract if a condition is stipulated that the entrepreneur must guarantee the capital against destruction not caused by his negligence or transgression:

- The Ḥanafīs and Ḥanbalīs ruled that the condition would be invalid, and the contract remains intact. This also implies that a silent partnership with a condition of guaranteeing the capital would be a valid silent partnership, but losses would still be borne by the capitalist since the condition is nugatory.
- The Mālikīs and Shāfi‘īs ruled that the entire partnership contract would be rendered defective in this case, based on the presence of excessive *gharar* that is not in the nature of the contract.⁶
- On the other hand, as we have seen, there are circumstances where the entrepreneur would indeed guarantee the capital. As 'Ibn Qudāmah (, vol.5, p.144) put it: "If the capitalist stipulates that all the profits would accrue to the entrepreneur, then the contract is not a silent partnership; rather, it is a loan". In such loans, the borrower would in fact guarantee the capital. Thus, Al-Dardīr ruled that it is permissible for the entrepreneur to guarantee the capital if he is entitled to all the profits, since it is then a loan contract, and the entrepreneur's possession of the capital is a debt and not a trust.⁷

⁶Al-Samarqandī ((Hanafi), vol.3, p.25), 'Ibn Qudāmah (, vol.5, p.25), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.236).

⁷ 'Aqrab Al-Masālik ma‘a Bulghat Al-Sālik (vol.2, p.249).

30.2.2 Entrepreneur actions

Different entrepreneur actions have different legal status depending on whether the silent partnership is restricted or unrestricted.

1. Actions in unrestricted partnerships

As we have seen, the entrepreneur has full freedom in an unrestricted silent partnership to deal with anyone, anywhere. The only restriction when buying is the requirement that he pays a price less than or equal to the value of the merchandise. This latter restriction is standard for all purchases performed by a legal agent (*wakil*). In selling, 'Abū Ḥanīfa ruled that the entrepreneur may sell cash or credit, and with prices that deviate substantially from the goods' value. However, 'Abū Yūsuf, Muḥammad, the Shāfi'īs, and the Mālikis ruled that he is not allowed to engage in credit sales, or to sell at unreasonable prices. Finally, the Ḥanbalīs permitted the entrepreneur to trade cash or credit, but restricted him to trading at reasonable market prices.

Most jurists agreed that the entrepreneur may give the capital to an uncompensated volunteer to trade on his behalf. However, the Mālikīs required him first to get the capitalist's permission, otherwise he must guarantee the capital.⁸

Another difference between the Ḥanafīs and Mālikīs pertains to the entrepreneur's right to deposit the partnership's capital. The Ḥanafīs permit the entrepreneur to make such deposits, arguing that it is necessary for merchants to act thus. However, the Mālikīs do not permit entrusting any other party with the partnership's wealth, and ruled that the entrepreneur would have to guarantee the capital if he does.

Jurists agreed on a permitting number of actions that they deemed necessary for running a profitable business, thus they allowed entrepreneurs to:

- Hire other workers or to lease properties and means of transportation.
- Commission legal agents to trade on their behalf.
- Engage in pawning part of the capital or receiving pawned objects in lieu of debts owed to the partnership. This follows from his right to initiate debts and credits, as long as the capitalist is alive and has not terminated the entrepreneur's authorization to use the capital.
- The Mālikīs, most of the Ḥanafīs, and some of the Ḥanbalīs,⁹ permit the entrepreneur to travel with the partnership's capital to seek profit.¹⁰

⁸ Al-Dardīr ((Mālikī)A, vol.3, p.521).

⁹ Qādī 'Abū Ya'cīlā said that this permissibility is inferred by analogy to the permission of trustees to travel with a deposited item.

¹⁰ Al-Kāṣānī ((Ḥanafī), vol.6, p.87), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.63), Al-Tahāwī ((Ḥanafī), p.125), Al-Sarakhsī (1st edition (Ḥanafī), vol.22, p.38 onwards), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, pp.57,68), *Majma' Al-Damānāt* (p.305 onwards), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.506), Al-Dardīr ((Mālikī)A, vol.3, pp.524,528), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, pp.315,317), Al-Buhūtī (3rd printing (Ḥanbalī), vol.2, p.263), 'Ibn Qudāmah (, vol.5, pp.35-38), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.211).

However, the Shāfi‘īs and other Hanbalīs ruled that such travel requires the capitalist's permission.

Restrictions on the entrepreneur

There are a number of actions that the entrepreneur in an unrestricted silent partnership is not permitted to undertake unless they are explicitly mentioned in the contract.¹¹ We list some of those restrictions below:

- The Ḥanafīs, Shāfi‘īs, and Hanbalīs ruled that the entrepreneur in a silent partnership is not permitted to incur debts in the name of the partnership, unless he obtains a prior explicit permission from the silent partner. If the entrepreneur undertakes such debts without the silent partner's permission, the debt would be considered his alone, and the silent partner bears no responsibility. This ruling is based on the view that such a debt is tantamount to increasing the capital of the partnership (through increased liability) without the capitalist's permission.
- The Ḥanafīs also ruled that the entrepreneur is not permitted to lend any part of the partnership's capital without the capitalist's permission.
- The Mālikīs ruled that the entrepreneur is not permitted to engage in credit purchases, even if the capitalist gave permission to do so. If he does engage in such sales, he must thus guarantee the capital, and all profits accrue to him. The second part of the ruling follows from the Prophet's (pbuh) prohibition of a capitalist's collection of profits through capital that was guaranteed by another.
- The same principle is used to rule that the entrepreneur may not buy goods on behalf of the partnership with total cost (cash or credit) exceeding the partnership's capital. In this case, the entrepreneur would guarantee the excess payment or liability. If the entrepreneur does in fact make such excess expenditures without the capitalist's permission, then the two are considered partners, with the excess expenditure being the entrepreneur's contribution to the partnership's capital. However, if the capitalist accepts the dealing explicitly or by dealing in the purchased items, then the trade is considered to be part of the silent partnership.
- The entrepreneur is legally forbidden to give away any significant part of the partnership's capital as a gift.¹²

¹¹ Al-Kāsānī ((Ḥanafī), vol.6, p.90 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.80), Al-Sarakhsī (1st edition (Hanafi), vol.22, p.178), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.69), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.507).

¹² Al-Buhūtī (3rd printing (Hanbalī), vol.4, p.256), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.216), Al-Dardīr ((Mālikī)A, vol.3, p.528), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.239), 'Ibn Juzayy ((Mālikī), p.283), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, pp.211,216,226).

- It is not permitted for the entrepreneur in a silent partnership to engage in a money transfer to fulfill a person's debt (*saftajah*). This forbidden procedure would be effected as follows: the entrepreneur takes a loan from one party to deliver the money to another creditor in a different country. In this case, the entrepreneur would bear the risks incurred in the transfer, and the creditors would thus benefit from this loan that the first extended to the entrepreneur. As we have seen previously, it is well established that loans that cause any benefit to the creditor are forbidden.
- Unless the capitalist explicitly permits the entrepreneur to engage in any partnerships he wishes, or gives him a license to use his best judgment, the entrepreneur is not allowed to: (i) use the capital to act as a capitalist in another silent partnership, (ii) use the capital to engage in another partnership, or (iii) mix the capital with his own or another's capital. Those restrictions are explained as follows:
 - The second silent partnership is not permitted based on the general principle that a contract may not be used recursively in another identical contract. For instance, a legal agent (*wakil*) in some transaction is not permitted himself to commission another legal agent for the same task.
 - A partnership is more general than a silent partnership, and thus the restriction against using the capital in a silent partnership implies that it may not be used for a regular partnership.
 - Mixing the silent partnership capital with other capital would give the owner of the other capital a legal right to the initial capitalist's property, which is not permitted unless the capitalist permits it.¹³

Obligations of the entrepreneur

The obligations of the entrepreneurs are established by convention in his profession and location. In particular, if the entrepreneur hires a worker to perform one of his obligatory tasks under the contract, then he should pay the hired worker out of his own money. However, if he hires a worker to perform a job that is not part of the obligatory tasks of the entrepreneur, then he may pay him out of the partnership money.

Recursive silent partnership

We now turn back to the case where the entrepreneur in a silent partnership uses the capital to act as a capitalist in another silent partnership. We have seen that the Ḥanafīs do not allow the entrepreneur to act thus without the initial capitalist's permission. We now consider the Ḥanafi rulings for the case where the entrepreneur does in fact use the capital in a second silent partnership without the first capitalist's permission:

¹³ Al-Kāsānī ((Hanafi), vol.6, p.95 onwards), 'Ibn Al-Humām ((Hanafi), vol.7, p.64), Al-Zayla'ī ((Hanafi Jurisprudence), vol.5, p.58), 'Ibn 'Abidīn ((Hanafi), vol.4, p.507).

- 'Abū Ḥanīfa ruled that the entrepreneur guarantees the capital only if the second entrepreneur makes a profit. This guarantee only comes into effect after profits are made, and it is not effected before that (not even after the second entrepreneur begins using the capital, but before profits are made). Thus:
 - The mere act of delivery of the capital to the second entrepreneur is considered a deposit, which is permitted, and thus does not require guaranteeing the capital.
 - If the second entrepreneur begins using the capital, that is considered voluntary trading on the first entrepreneur's behalf (*ibdā'*), which is also permitted.
 - However, if the second entrepreneur makes profits and earns a share thereof, the second partnership becomes established, and thus the first entrepreneur must guarantee the capital, in analogy to the case of mixing the capital with another.

Under the first two sets of circumstances, the first entrepreneur is still considered a trustee for the capital, and if it were to perish, he normally would not be required to compensate the first capitalist.

Moreover, if the second silent partnership is defective, then the second entrepreneur is in fact a hired worker. In this case, a second partnership is never established, and thus the first entrepreneur is not required to guarantee the capital.

- Zufar ruled that the first entrepreneur must guarantee the capital as soon as he delivers the capital to the second entrepreneur, whether or not the latter uses it. He thus ruled that while the entrepreneur is permitted to deposit the capital, he was not permitted to use it in a silent partnership. Thus, by delivering the capital to the second entrepreneur, he would have violated the first contract, and would have to guarantee the capital. This is in analogy to the recipient of a deposit who re-deposits it with another, whereby he would guarantee the deposited properties.
- The best supported Hanafi opinion is that which was supported by 'Abū Yūsuf and Muhammad. They ruled that the partnership is established as soon as the second entrepreneur begins to use the capital, whether or not he makes any profits. Thus, that is the event in which the second entrepreneur is considered to be using the first capitalist's capital without his permission, and thus the capital must be guaranteed.¹⁴ In this case, the first capitalist is given the option whether the first or the second entrepreneur should guarantee his capital. If profits are in fact made in the second silent partnership, then the capitalist must collect his share as

¹⁴ Al-Kāsānī ((Hanafi), vol.6, p.96), 'Ibn Al-Humām ((Hanafi), vol.7, p.70 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.22, p.98), Al-Zayla'ī ((Hanafi Jurisprudence), vol.5, p.63), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.509).

specified in the first contract, and the two entrepreneurs share the residual share according to their agreed-upon ratio in second contract.

- This majority Ḥanafī opinion was also supported by the Ḥanbalī Judge 'Abū Ya'la.¹⁵ However, 'Ibn Qudāmah (, ibid.) said that this opinion is not in accordance with the fundamentals of the Ḥanbalī school, and that it disagrees with the ruling of 'Ahmad ibn Ḥanbal. The latter 'Imām ruled that the entrepreneur would not be entitled to any share in profits in this case.
- The Mālikīs ruled that the first entrepreneur guarantees the capital as soon as he delivers it to the second entrepreneur without the capitalist's permission, since he would have thus transgressed. In this case, the second entrepreneur and the capitalist share the profits. In this regard, they argue, the profit share in a silent partnership is a compensation for completing the work. Since the first entrepreneur did not work, he deserves no profit share from the first contract. The second entrepreneur must then pay the first entrepreneur whatever share in his profits was agreed upon in the second contract.
- The majority of Shāfi'iis ruled that an entrepreneur in a silent partnership is not permitted to use the capital in a second silent partnership, even if the capitalist were to approve it. They thus ruled that the first silent partnership remains valid, but the second entrepreneur must not be paid the going market wage for his work.¹⁶ This ruling follows from their view that silent partnership is a special contract (a license) that would have been invalidated based on reasoning by analogy. In this contract, there are two sides: an owner who does not work on the one hand, and workers on the other. In the case considered here, the first and second entrepreneurs are considered two workers. The silent partnership contract - as a special license - does not allow for side-contracts between the workers, thus invalidating the second silent partnership.

Summary

The above may be summarized by considering three types of actions of the entrepreneur in an unrestricted silent partnership, according to the Ḥanafī classification:

- Actions that are conventionally undertaken by entrepreneurs (e.g. trading, commissioning legal agents for trade, etc.). Those actions are permitted whether or not the capitalist gives an explicit permission. In this case, the Ḥanafis agree that the entrepreneur may only buy at reasonable market

¹⁵ibid., *Al-Sharikāt fī Al-Fiqh Al-'Islāmī* by Dr. ʻAlī Al-Khaṭīf (p.81), 'Ibn Qudāmah (, vol.5, p.44).

¹⁶Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.314), 'Ibn Qudāmah (, vol.5, p.43), 'Ibn Juzayy ((Mālikī), p.283), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.214).

prices, and most of them agree that the same restriction applies to selling as well as buying.

- Actions that require general permission from the capitalist (e.g. permission to do as he sees fit). This class of actions includes using the capital in a second silent or regular partnership. The Ḥanafīs ruled that such actions are valid if the capitalist gave the entrepreneur enough freedom to do so.
- Actions that require explicit and specific permission from the capitalist. This class of actions includes charitable and gift giving, lending, and selling or buying at subsidized prices. Most jurists add to this list spending money in excess of the partnership's capital in buying merchandise on its behalf. The Shāfi‘īs, Mālikīs, and Ḥanbalīs add credit purchases to the list.

2. Actions in restricted partnerships

All rulings that apply to unrestricted silent partnerships also apply to restricted ones, with few additions effected by the stipulated restrictions. In this regard, location or line-of-business restrictions render the entrepreneur's agency of the capitalist a restricted representation. Those restrictions interact with the general ones pertaining to all silent partnerships. In what follows, we consider each set of restrictions separately:

A. Location restrictions

If the capitalist in a silent partnership stipulates in the contract that the entrepreneur may only use the capital in a particular city or area, then the entrepreneur is bound by that condition. This restriction qualifies as a useful condition in the contract, since prices vary across locations, and travel increases the risk associated with transported capital.

In this regard, the restriction applies to the capital, and not only to the entrepreneur. Thus, the entrepreneur who is restricted to use the capital only within a particular city may not give it to another to trade outside of that city. If the entrepreneur takes the capital out of the city himself, or if he commissions another to take it out, then he must guarantee the capital, and all profits and losses accrue to him. ’Abū Ḥanīfa and Muḥammad added that profits collected thus are not a good source of income, while ’Abū Yūsuf deemed it a good source.

If, on the other hand, the capital is transported out of the city and then returned without using it in any trades, then the contract is restored and the guaranty is revoked. The Ḥanafīs made this ruling in analogy to the case where the recipient of a deposit violates the depositor's conditions, but then reverts to abidance without having caused any losses.¹⁷

¹⁷ Al-Sarakhsī (1st edition (Ḥanafī), vol.22, pp.42,46), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.59), Al-Kāṣānī ((Ḥanafī), vol.6,p.98), Ibn Al-Humām ((Ḥanafī), vol.7, p.64 onwards), Al-Tahāwī ((Ḥanafī), p.125).

If the contract specified a very limited area for the entrepreneur's work (e.g. "use the capital in this specific market"), and the entrepreneur went beyond that limited area, but did not go far (e.g. remained within the city), then there are two rulings. The ruling according to reasoning by analogy would render the entrepreneur's behavior impermissible, while the ruling by juristic approbation would render it permissible. The ruling by analogy stresses the logical equivalence of conditions that restrict actions to specific area, regardless of how small or large that area may be. On the other hand, the Ḥanafi ruling based on juristic approbation considers the potential economic benefit from the condition. In this regard, if the contract specified a very small area, and there was no economic benefit from that restriction, the excessive restriction would be considered nugatory.

On the other hand, the Ḥanafis ruled that if the condition explicitly ruled out working anywhere outside that limited area (e.g. "do not use this capital anywhere except in this specific market"), then the condition is binding. In this case, if the entrepreneur trades outside the specific market, he would guarantee the capital. This case is different from the one discussed in the previous paragraph. The case discussed previously included an overly restrictive condition with no economic benefit, and thus part of it was rendered nugatory. However, when the capitalist explicitly forbids the entrepreneur from certain dealings, the condition becomes binding. In this regard, jurists consider the precise language used in the contract to determine whether or not the location restriction is a condition that may be relaxed.

B. Restricted set of individuals

The Ḥanafis and Ḥambalīs permit the capitalist to stipulate in the contract that the entrepreneur has to deal with specific individuals when working with the partnership's capital. They justify this ruling by the possibility of reducing business risks by restricting the set of individuals with whom the entrepreneur deals.

As we have seen previously, the Mālikīs and Shāfi'īs reject this type of contract restrictions. Their view is that silent partnerships require allowing the entrepreneur freedom to search markets for the most profitable opportunities. Thus, restricting the set of trading or business associates would violate this fundamental goal of establishing a silent partnership.

C. Temporal restrictions

The Ḥanafis and Ḥambalīs permit the capitalist to specify a limited time period for the silent partnership, after which it becomes voided. They reasoned that the contract is primarily one of agency, which may be temporally restricted. In this regard, they argued that restricting the time period of the partnership can be economically beneficial, in analogy to the other restrictions mentioned previously, and thus the restriction is permitted.¹⁸

¹⁸ Al-Kāsānī ((Hanafi), vol.6, p.99), 'Ibn Al-Humām ((Hanafi), vol.7, p.65).

We have seen previously that the Mālikīs and Shāfi‘īs would consider a silent partnership with temporal restrictions invalid. Their reasoning is that the object of the contract is to make profits. In this regard, if profits are not made within the specified time period, the purpose of the contract would be negated. Moreover, it may be clear that waiting beyond the specified time period would increase profits, and this condition would be contrary to the nature of the contract.¹⁹

Ex post restrictions

The Ḥanafis ruled that the capitalist is permitted to add ex post restrictions to an otherwise unrestricted silent partnership as long as the capital is in monetary form. This includes the cases where the capital was never used by the entrepreneur, as well as the case where it was used for trading, but is currently in monetary form. In all such cases, any restriction that can be of economic benefit may be added ex post. However, while the capital is held in non-monetary form (e.g. after the entrepreneur used it to buy some goods), the capitalist is not allowed to add a condition (e.g. do not sell those goods on a credit basis), since the entrepreneur’s trade concluded the unrestricted silent partnership. After those goods are sold and the capital returns to monetary form, adding new conditions is allowed in analogy to the capitalist’s ability to add such conditions at the inception of the contract.

General rulings on restrictions

Thus, we see from the previous discussions that the Ḥanafis ruled based on the potential economic benefit served by restrictive conditions. In contrast, they consider all restrictions that are not economically beneficial nugatory. For instance, a condition that the entrepreneur does not trade immediately is considered invalid and nugatory.²⁰

On the other hand, the Mālikīs and Shāfi‘īs view the silent partnership contract as a means for the entrepreneur to make profits through conventional market dealings. Thus, they argue, any condition that contravene with such conventional actions of the entrepreneur would render the silent partnership defective.²¹

30.2.3 Rights of the entrepreneur

The silent partnership contract entitles the entrepreneur to two rights: spending rights, and rights to the named portion of profits.

¹⁹ Al-Khaṭīb Al-Shirbīn ((Shāfi‘ī), vol.2, p.312), 'Ibn Qudāmah (, vol.5, p.63), Al-Dardīr ((Mālikī)A₂, vol.3, p.521).

²⁰ 'Ibn 'Abidīn ((Hanafī), vol.4, p.508).

²¹ ibid., *Al-Sharikāt fī Al-Fiqh Al-'Islāmī* by Dr. 'Alī Al-Khaffif (p.74).

1. Expenses chargeable to the partnership

There are varying opinions regarding the entrepreneur's spending rights:

- Al-'Imām Al-Shāfi'ī had two opinions, the better accepted of which forbids the entrepreneur from charging personal expenses (including travel expenses) to the partnership, without the capitalist's permission. This ruling is based on the view that the entrepreneur's only compensation is his stated share in profits. In this regard, personal expenditures are viewed as an extra benefit, the monetary value of which may indeed equal the total profits, thus the entrepreneur would have collected all the profits. In fact, the spent amount may exceed total profits, in which case the entrepreneur would have effectively taken part of the capital. All such cases are clear violations of the silent partnership contract rules, and thus any stipulated condition that the entrepreneur may charge personal expenses to the partnership's capital would render the contract defective.²²
 - 'Ibrāhīm Al-Nakhī'ī and Al-Ḥasan Al-Baṣrī ruled that the entrepreneur is permitted to charge personal expenses to the partnership, be they travel expenses or otherwise.²³
 - The majority of jurists, including 'Abū Ḥanīfa, Mālik, and the Zaydīs, ruled that only basic travel expenses (i.e. food and clothes) may be charged to the partnership. They ruled that such expenses may be deducted from the profits (if there are any), or from the principal capital of the partnership.²⁴
- Al-'Imām Mālik ruled that such basic travel expenses may be charged to the partnership if its capital can accommodate such expenses. However, all personal expenses other than travel expenses must be from the entrepreneur's own money, and he may not charge them to the partnership unless working for the partnership takes him away from his usual source of sustenance. In the latter case, he is permitted to charge basic personal expenses to the partnership.
- The Ḥanbalīs permitted charging personal expenses to the partnership if and only if that was stipulated as a contract condition.²⁵

Those who permitted charging personal expenses in certain cases based their ruling on the view that entrepreneurs would not engage in silent partnerships unless they could guarantee being able to meet their basic personal needs. In this regard, those who single out travel expenses argue that the entrepreneur

²² Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.387), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.317).

²³ Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.238).

²⁴ Ibn Rushd Al-Hafid ((Mālikī), ibid.), Al-Kāṣanī ((Hanafi), vol.6, p.105), 'Ibn Al-Humām ((Hanafi), vol.7, p.81), Al-Sarakhsī (1st edition (Hanafi), vol.22, p.63), Al-Taḥāwī ((Hanafi), p.125), Al-Dardīr ((Mālikī)A, vol.3, p.530), *Al-Muntazāc Al-Mukhtār* (vol.5, p.333), 'Ibn Juzayy ((Mālikī), p.283), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.217).

²⁵ Ibn Qudāmah (, vol.5, p.64), Al-Buhūtī (3rd printing (Hanbalī), vol.2, p.265).

would be traveling for the benefit of the partnership, and while traveling, he would have no other source of income. The alternative, they argue, would be to force the entrepreneur to use his own money to meet his travel expenses, which can lead to financial losses.

As we have seen, all jurists who permit charging certain types of expenses to the partnership restrict this permission to basic expenses. In this regard, the Hanafis explicitly list what they considered conventional basic needs. This list excluded medical expenses, which they argued to be incidental expenses caused by a temporal health condition. However, 'Abū Ḥanīfa ruled that expenditures on medicine may be charged to the partnership, since such expenditure allows him to restore his physical abilities, without which he cannot perform his work. Thus, he ruled that medical expenditure is similar to basic expenditure on food.²⁶

If the entrepreneur spends out of his own money to cover expenses that are chargeable to the partnership, that amount of money is established as debt of the partnership towards him. This ruling is in analogy to a guardian spending his own money on a child, in which case it is considered a debt on the child's property. In both cases, the expenditure is authorized out of another property, and thus if he uses his own money, the amount becomes a credit owed to him.²⁷

Amount of charged expenses

Jurists ruled that the amounts that entrepreneurs may charge to silent partnerships must be reasonable. Thus, if the entrepreneur charges excessive amounts as personal expenses, he must guarantee the amount in excess of normal necessary expenses. This ruling is based on the rule that implicit permissions are generally assumed to be restricted to conventional behavior.

Jurists also specified the types of expenses that may be charged to the partnership, as well as the timing of reimbursement:

- The entrepreneur is entitled to reimbursement for his travel expenses, even if he does not succeed in conducting the business transactions for which he traveled.
- If the entrepreneur returns home and finds that he has some unused clothes or goods that he bought as travel expenses, then he must return those goods to the partnership capital. In this case, the permission to use those goods expires with returning home and the termination of the permission to charge travel expenses to the partnership.
- The entrepreneur may charge his basic travel expenses to the partnership even if he carried some of his own money on the trip. If the entrepreneur

²⁶Al-Kāsānī ((Hanafi), vol.6, p.106), 'Ibn Al-Humām ((Hanafi), vol.7, p.81), Al-Zayla^cī ((Hanafi Jurisprudence), vol.5, p.70), 'Ibn 'Abidīn ((Hanafi), vol.4, p.512), *Majma^c Al-Damānat* (p.308).

²⁷Al-Kāsānī ((Hanafi), ibid., p.107).

travels with the capital of two capitalists, then he should charge his basic travel expenses to both partnerships in the proper ratio.²⁸

- If the entrepreneur travels for partnership business, his basic personal expenses may be considered travel expenses while traveling, or while residing away from home for fifteen days or less. The important consideration in this regard is that the entrepreneur does not establish the dwelling away from home as a new residence (the Mālikīs ruled that the criterion is not having married there).

How expenses are deducted

If the partnership makes profits, then the entrepreneur's eligible expenses should be charged to the profits (prior to distribution). If there were no profits, then such expenses should be deducted from the capital of the partnership. This ruling is based on the view that such expenses are losses to the partnership, which should primarily be deducted against profits if they exist.

2. Entrepreneur's right to stated profit share

As we know, the entrepreneur in a valid silent partnership is entitled to his stated share of profits according to the contract. If the partnership did not result in any profits, then the entrepreneur is not entitled to any other financial reward. As a partner, he is self-employed, and thus does not earn any wages.

The entrepreneur is only entitled to receive his profit share after he delivers the capital to its owner (the silent partner). Thus, if the entrepreneur generates profits, but the capital perishes in his possession (and thus is not delivered to the silent partner), the stated profit sharing rule is voided. In this case, whatever the capitalist receives counts towards his capital, and whatever was delivered to the entrepreneur is considered a debt on the entrepreneur. If any profits remained after the capitalist received his full principal capital, then it is shared according to the stated rule.

Proof for this rule – that the principal must be delivered to the capitalist before profits are shared is - provided by the *Hadīth* in which the Prophet (pbuh) was reported to have said: “The example of a faithful Muslim is like that of a merchant. The latter may not receive his profits until he delivers the principal capital, and the former is not rewarded for supererogatory deeds until he performs all obligatory acts of worship”.²⁹ This *Hadīth* is proof that profits are an increase over the principal, which is not considered or divided until the principal is delivered to its owner.

If the entrepreneur and capitalist disagree over whether or not the capital was delivered prior to dividing the profits between them, the Ḥanafīs and Ḥanbalīs ruled that the capitalist's claim is accepted, and the entrepreneur must

²⁸ Al-Kāsānī ((Ḥanafī), ibid.).

²⁹This *Hadīth* was reported in Al-Kāsānī ((Ḥanafī), vol.6, p.107), however, I have not been able to find it in any of the major *Hadīth* references.

deliver the principal capital he received. Then, if any money remained, the two parties may share it in half. In this case, the entrepreneur is making a positive claim (that the principal has been returned to its owner), while the capitalist is denying that claim. In such cases, the claim of the denier is given legal priority. Thus, even though the entrepreneur is considered a trustee, his claim still does not get legal priority. In this regard, the trustee's claim is accepted with regards to dropping his responsibility to guarantee the capital, but his claim with regards to delivery to another is not given such priority.³⁰

In this context, the Ḥanafīs, the majority of Shāfi'īs and the Mālikīs agree that the entrepreneur's entitlement to his profit share is effected by returning the capital and dividing profits, rather than the mere realization of profits. On the other hand, the Ḥanbalīs and Zaydīs ruled that the worker is entitled to his profit share as soon as profits are realized, even if that happens before the total money is divided between him and the capitalist. However, all jurists agree that the entrepreneur does not collect his profit share until he delivers the principal capital to the capitalist. Only then can the profits be divided according to the ratios specified in the contract.³¹

30.2.4 Rights of the capitalist

As we have seen, the capitalist is entitled to his portion of profits if any were realized. As we have seen, the capitalist also has the right to collect all of his principal before the entrepreneur gets his profit share. In this regard, the entrepreneur must convert all the partnership's property into monetary form, and pay the capitalist back his principal, and then they share any realized profits as specified in the contract.³²

Moreover, 'Ibn Rushd said: "Major jurists have all agreed that the entrepreneur may only collect his profit share in the presence of the capitalist. In this regard, it is not sufficient that the entrepreneur provides sufficient legal proof, and physical presence of the capitalist is required. Also, the capitalist bears all losses in a silent partnership, whether the loss resulted from natural causes, or any other cause other than the entrepreneur's negligence or transgression".³³ Such losses include any decrease in the value of the partnership's capital, whether caused by market conditions (e.g. if prices of held goods decline significantly), natural disasters, or theft. In all such cases, the losses are fully borne by the capitalist as long as the entrepreneur cannot be blamed for negligence or transgression.

³⁰ Al-Kāsānī ((Ḥanafī), vol.6, p.107 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.22, pp.20,105), Al-Zayla'ī ((Ḥanafī Jurisprudence), vol.5, p.68), 'Ibn 'Abidīn ((Ḥanafī), vol.4, p.511).

³¹ Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.318), 'Ibn Qudāmah (, vol.5, p.51), Mar'ī ibn Yūsuf (1st printing (Hanbalī), vol.3, p.175).

³² Al-Kāsānī ((Hanafi), ibid., p.108), Ibn-Rushd Al-Qurtubī ((Mālikī), vol.3, p.8).

³³ Ibn Rushd Al-Hāfiḍ ((Mālikī), vol.2, p.238).

Chapter 31

Capitalist-Entrepreneur Disagreements

The capitalist and entrepreneur in a silent partnership may disagree in matters pertaining to: (i) the entrepreneur's actions (permitted or otherwise), (ii) capital destruction, (iii) whether or not the capital was returned to the capitalist, (iv) the agreed-upon profit shares, or (v) the amount of principal capital used in the partnership. In what follows, we consider each of those potential types of disagreements in some detail:

31.1 Disagreements over entrepreneur actions

If one party claims that the partnership was specific (e.g. to a specific line of business, or a particular location), while the other claims its generality, the generality claim is given legal priority. Also, if the capitalist claims that he forbade the entrepreneur from dealing outside a restricted set of commodities or a restricted geographic location, while the entrepreneur denies that claim, the entrepreneur's claim is accepted over the capitalist's. This ruling is based on the opinion that silent partnership is primarily a general unconstrained contract with the aim of generating profits. Thus, when the two claims contradict one another, the one that is more in accordance with the nature of the contract is given legal priority and accepted.

On the other hand, if the two parties disagree over the nature of the restriction (e.g. one claims that trading was restricted to clothes while the other claimed that it was restricted to grains), then the capitalist's claim is accepted. In this case, both restrictions are equally close to the natural form of the contract (which is unrestricted), and thus neither can be chosen based on that criterion. Jurists then decided that the capitalist is the one who stipulated the restriction, and thus his claim is given priority over the entrepreneur's.¹

¹ Al-Kāsānī ((Hanafi), vol.6, p.109), 'Ibn Al-Humām ((Hanafi), vol.7, p.87), Al-Sarakhsī

31.2 Disagreement over capital destruction

If the entrepreneur claims that the capital perished and the capitalist denies that claim, then jurists agree that the entrepreneur's claim is accepted. The entrepreneur's claim is also accepted if the capitalist agrees that the capital had perished but claims that its destruction was caused by the entrepreneur's transgression. The ruling in both cases is based on the entrepreneur's status as a trustee. The default status of such trustees is non-transgression, hence the capitalist is making a claim that something out of the ordinary had occurred, while the entrepreneur is denying that claim. In such cases, the denier's claim is accepted, as it would be in the case of a trustee who had accepted a deposit, and then the depositor made a similar claim.

31.3 Disagreement over capital repayment

If the entrepreneur claimed that he had returned the capital to the capitalist, while the capitalist claimed that he had not, we have seen that the Ḥanafīs and Ḥanbalīs accept the capitalist's claim. Their proof is that the entrepreneur accepted receipt of the capital seeking benefit, and thus analogy cannot be drawn to the case of a borrower whose claim would be accepted with regards to repayment of debts. On the other hand, the Mālikīs and the majority of the Shāfi‘īs ruled that the entrepreneur's claim of repayment is accepted, in analogy to the acceptance of claims of other trustees (e.g. a depositary).²

31.4 Disagreement over capital amount

Jurists agree that if the capitalist and entrepreneur were to disagree over the amount of capital delivered in the beginning of the partnership, the entrepreneur's claim is accepted.³ In such cases, the capitalist is making a claim for the extra amount, while the entrepreneur is denying it. Since the entrepreneur's claim will be accepted if denied having received any amount, it is certainly accepted if he denies part thereof.

If the two parties disagree both over the initial capital, and over the profit ratios, then the Ḥanafīs and Ḥanbalīs ruled that the entrepreneur's claim is accepted regarding the initial capital, while the capitalist's claim is accepted regarding the profit sharing rule. On the other hand, the Shāfi‘īs ruled that the entrepreneur's claim is accepted on both counts if he supports it with an oath.

(1st edition (Ḥanafī), vol.22, p.42), Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.75).

² Al-Kāṣānī ((Ḥanafī), vol.6, p.108), 'Ibn Qudāmah (, vol.5, p.70), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.322), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.389), Al-Dardīr ((Mālikī)A, vol.3, p.536), Mar‘ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.178).

³ Al-Zayla‘ī ((Ḥanafī Jurisprudence), vol.5, p.74), Al-Kāṣānī ((Ḥanafī), vol.6, p.109), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.86), Al-Sarakhsī (1st edition (Ḥanafī), vol.22, p.27), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.241), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.321), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.389), 'Ibn Qudāmah (, vol.5, p.69), Mar‘ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.178).

Their opinion is based on the view that the default situation is paying no more than the original capital, and no profits.

31.5 Disagreement over profit ratios

If the two parties disagree only over the profit ratio agreed upon in the contract, then the Hanafīs, and most of the Hanbalīs ruled that the capitalist's claim is accepted. In this case, they argue that the capitalist is denying the extra profit share that the entrepreneur claims for himself. As we have seen previously, the claim of the one making a denial is given legal priority.⁴ This general rule is based on the Prophet's (pbuh) *Hadīth*: "The claim of the one denying a charge is accepted".⁵

On the other hand, the Mālikīs ruled that the entrepreneur's claim is accepted in this case if supported by his oath, and if two conditions hold:

1. The profit ratio claimed by the entrepreneur must be reasonable compared to conventional contracts.
2. At the time of the claim, the capital must continue to be in the entrepreneur's possession either physically, or legally (e.g. if it is deposited with a third party).⁶

The Shāfi'īs differ from the other schools by ruling in this case that the entrepreneur and capitalist should each take an oath to support their respective claims. The mutual oath taking in this case is ruled in analogy to the case where a buyer and seller disagree over the price. Thus, the contract is voided by one of the parties, both parties, or a judge, but not automatically based on the mutual oath taking. If the contract is voided, then the entrepreneur must be paid the going market wage for his work. This ruling, as we have seen previously, is based on the view that the worker's work cannot be returned to him, and therefore he must be paid its value, which is the going market wage.⁷ On the other hand, they rule that if entrepreneur claims that he earned no profits, and if he supports this claim with his oath, then his claim is accepted based on the principle that the default outcome is no profit.

⁴ Al-Sarakhsī (1st edition (Hanafī), vol.22, p.89), Al-Kāsānī ((Hanafī), vol.6, p.109), 'Ibn Qudāmah (, vol.5, p.70), Marī' ibn Yūsuf (1st printing (Hanbalī), vol.2, p.178).

⁵ Narrated by Al-Bukhārī and Muslim on the authority of 'Ibn 'Abbās. Al-Bayhaqī narrated it in his *Sunan* as follows: "If people's charges against others were to be accepted, people would claim others' properties and lives. Nay, the onus of the proof is on the one making a charge, and the denier's claim is accepted if he takes an oath [and there is no independent proof]", c.f. Al-Hāfiẓ Al-Zayla'ī (1st edition, (*Hadīth*), vol.4, p.96). Al-Tirmidhī and Al-Daraqutnī each narrated in their respective *Sunan* a *Hadīth* on the authority of 'Amr ibn Shu'ayb on the authority of his father and grandfather that the Prophet (pbuh) said in a *khuṭbah*: "The one leveling a charge needs to provide proof, and [if he doesn't, then] the claim of the charged one is accepted based on his oath", c.f. Al-Hāfiẓ Al-Zayla'ī (1st edition, (*Hadīth*), vol.4, p.390).

⁶ Al-Dardīr ((Mālikī)A, vol.3, p.537), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.241).

⁷ Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.322), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.389).

31.6 Disagreements over the capital

The two parties may disagree over whether the capital was given to the entrepreneur as: (i) part of a silent partnership, (ii) as a deposit, (iii) as a *mubāda'ah* (i.e. all profits accrue to the capitalist), (iv) or as a loan (i.e. all profits accrue to the entrepreneur). If the capitalist claims any of the first three cases to be true, while the entrepreneur claims the fourth case to be true, the Ḥanafīs, Ḥanbalis, and Shāfi'īs accept the capitalist's claim. Their ruling is based on the fact that the capital is the capitalist's property, and the claims relate to the nature of the contract under which he gave the capital to the entrepreneur. Moreover, they argue, the entrepreneur in this case is making a claim regarding the capitalist's surrender of ownership of profits, while the capitalist denies that claim. Thus, they ruled in favor of the capitalist, in analogy to their resolution of agreements over the nature of the capital.

In contrast, the Mālikīs ruled that the entrepreneur's claim is accepted in this case if supported by his oath. Their ruling is based on analogy to disagreements over profit ratios. Thus, they give the entrepreneur's claim priority based on his work and effort. Moreover, they argue that their ruling can be obtained based on the entrepreneur's status as a trustee.

On the other hand, if the capitalist claimed that he gave the money as a loan, but the entrepreneur said that it was in fact a silent partnership, then the majority of jurists agree that the entrepreneur's claim is accepted. In this case, both parties would have agreed that the entrepreneur received the capital with the capitalist's permission. Then, the capitalist would be claiming that the entrepreneur must guarantee the capital (as a borrower), while the entrepreneur denies this claim of guaranty. Thus, the entrepreneur's claim is accepted as a denier. In contrast, the Mālikīs ruled that the capitalist's claim is accepted if supported by his oath. Their proof is that the default ruling for delivery of property is guarantee by the recipient, thus supporting the capitalist's claim of guaranty by the entrepreneur.⁸

⁸ibid., Al-Dardir ((Mālikī)A, vol.3, p.536), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.321), Al-Dardir ((Mālikī)B, vol.3, p.708).

Chapter 32

Invalid Silent Partnerships

There are five sets of actions or circumstances that would render a silent partnership invalid:¹

32.1 Terminating authorization to work

All four schools of jurisprudence agree that a silent partnership may be invalidated either by direct voiding, or by withdrawing the authorization to the entrepreneur to deal with the capital provided two conditions are met:

1. The other party is informed of the voiding or termination of authorization to work with the partnership's capital.
2. The partnership's capital must be in monetary form at the time of terminating the authorization to work.

Thus, if one of the two conditions is not met, the voiding or termination of authorization to work does not invalidate the contract. In such cases, the entrepreneur's actions continue to be valid under the contract. Thus, if the capital were in non-monetary form at the time the capitalist attempted to terminate the authorization to work, the entrepreneur continues to have the right to sell those goods to realize the monetary profits. In this case, the capitalist cannot deny him the right to sell and realize the profits in which he has an established share.

The Mālikīs further require mutual consent for voiding the contract, since they render the contract binding on both parties once work had begun. As we have seen previously, the other schools consider the contract non-binding at all times.

¹Al-Kāsānī ((Hanafi), vol.6, p.112 onwards), 'Ibn Al-Humām ((Hanafi), vol.7, p.74 onwards), Al-Zayla^cī ((Hanafi Jurisprudence), vol.5, p.66 onwards), *Majma^c Al-Damānāt* (p.308), 'Ibn ^cĀbidīn ((Hanafi), vol.4, p.510), Al-Khaṭīb Al-Shirbīnī ((Shāfi^cī), vol.2, p.319 onwards), 'Abū-'Ishāq Al-Shirāzī ((Shāfi^cī), vol.1, p.388), 'Ibn Qudāmah (, vol.5, p.58), Al-Buhūtī (3rd printing (Hanbali), vol.2, p.269), Al-Dardīr ((Mālikī)A, vol.3, p.535).

32.2 Death of one of the parties

The majority of jurists ruled that a silent partnership is invalidated by the death of either party. This ruling is based on the contract's status as a agency, which is invalidated by the death of either the represented (*muwakkil*) or the one representing him (*wakil*), whether or not the other party knows of the death.

On the other hand, the Mālikīs ruled that the silent partnership is not automatically invalidated by one party's death. In this case, a deceased entrepreneur's heirs take his place if they are eligible for trust, otherwise, they may hire a trustee to undertake the work.²

32.3 Insanity

The non-Shāfi‘īs ruled that an incidence of insanity of one of the contracting parties invalidates a silent partnership, while the Shāfi‘īs required that such insanity be long term or irreversible for the contract to be invalidated. In this case, insanity invalidates eligibility for either side of a agency contract, thus invalidating the silent partnership. This ruling is also applicable if one party were to suffer long-term coma.

The rule also applies if the capitalist is put under legal guardianship due to mental incapacity. However, the Ḥanafis ruled that the contract is not voided if the entrepreneur is put under legal guardianship due to mental incapacity. In the latter case, they argue that he would still be allowed to commission another as a legal agent, in analogy to the case of a discerning child.

32.4 Apostasy

If the capitalist abandons Islām, and dies or is killed in a state of apostasy, or if he migrates to the land of war, then 'Abū Ḥanīfa ruled that the silent partnership is rendered invalid effective the day of apostasy. The case of joining the land of war is deemed equivalent to death, thus invalidating the capitalist's eligibility to deal in his property, and it is distributed according to the rules of inheritance.

On the other hand, if the entrepreneur were to commit apostasy, the silent partnership remains intact. Thus, profits continue to be shared according to the contract even if the entrepreneur were to die in a state of apostasy or join the land of war.

Note that in three of the four cases already studied: (i) voiding or termination of authorization, (ii) death of one of the parties, and (iv) apostasy, the entrepreneur may continue to trade in order to put the partnership's capital in monetary form.³

²Ibn Juzayy ((Mālikī), p.283).

³Al-Sarakhsī (1st edition (Ḥanafī), vol.19, p.104; vol.22, p.86), 'Ibn Al-Humām ((Hanafī), vol.7, p.76), Al-Kāsānī ((Hanafī), ibid.).

32.5 Destruction of the capital

If the partnership capital perishes in the possession of the entrepreneur prior to any dealings, the contract is invalidated. In this case, the entrepreneur received the capital to deal in it, and thus if the capital perishes, the contract is voided in analogy to the case of a deposit contract.

Similarly, if the entrepreneur consumed all of the capital, or gave it to another who consumed it all, there is no longer any capital for the partnership to exist, and it is voided. However, in the second case, if the entrepreneur were to collect compensation from the other consuming party, then he may continue to use that capital as property of the partnership.

32.6 Capital as credit

If the silent partnership is voided in one of the manners discussed above and the capital of the partnership is in the form of “accounts receivable”, or debts on others, then we consider different cases:

- If the entrepreneur refuses to collect the debts, and if profits had been realized, the judge may force him to collect the debts. In this case, he would be considered a hired worker, with his portion of the profits as his wage. As we know, the hired worker must perform those tasks that he made binding upon himself through the contract.
- However, if no profits were realized, the entrepreneur may not be forced to collect the debts. In this case, he is considered a legal agent who does not receive any compensation for the representation. Such a volunteer may not be forced to conclude what he volunteered to do.

The entrepreneur must thus transfer the accounts receivable to the capitalist so that he may collect. This transfer is necessary, otherwise the capitalist will not have the right to collect his capital through the entrepreneur's accounts receivables.

- In this case, any losses are first deducted against realized profits. Then, if the losses exceed realized profits, the difference is deducted from the capital. In all cases, as we have seen, the entrepreneur does not guarantee the capital against such losses, as long as they were not caused by his own negligence or transgression.

Part VIII

Contemporary Partnerships

Chapter 33

Juristic Analysis

The religion of Islam is very responsive to the economic needs of mankind. In general, every good source of income is permitted in Jurisprudence, while every questionable business practice that may lead to animosity and dispute is restricted. The Islamic Jurisprudence of partnerships and corporations is no exception to this general rule. Thus, the partnership system in Islam is based on mutual agreement, justice, and meeting mankind's economic needs in accordance with permissible conventions. This follows since the default status of contracts is permissibility, and prohibition is the exception. In this regard, one should reflect on the famous juristic saying: "Partnerships are established according to the customary behavior of merchants".

The three major sources of income are trade, industry, and agriculture. It is rare for any individual to be able to conduct business in one of those economic areas by himself. Cooperation with others helps economic agents to pool their human and financial abilities, technical expertise, etc. The net result of such cooperation is the ability to earn more income at a lower level of risk exposure. This cooperation is the Legal foundation for the partnership contract. Partnerships were mentioned in the Qur'an in a number of contexts. The behavior of partners is discussed in the verse "Truly, many are the partners (in business) who wrong each other: not so do those who believe and work deeds of righteousness, and how few are they?" [38:24]. Also, partnership in inheritance was explicitly addressed in the verse: "But if more than two, they share in a third" [4:12].

The legality of partnerships was clearly established in the Prophet's (pbuh) Sunnah. We have already quoted the *Hadīth Qudsi*: "I am the third of every two partners as long as neither one betrays the other. However, if one betrays the other, I leave their partnership". Moreover, there are many Hadīths in which the Prophet (pbuh) implicitly or explicitly approved of partnerships. In one such Hadīth, he (pbuh) said: "Allāh helps and protects partners as long as they do not betray one another". There are also valid narrations by 'Abū Dāwūd and 'Ibn Mājah that Al-Sā'ib ibn 'Abī Al-Sā'ib said to the Prophet (pbuh) after he (pbuh) was sent to mankind: "You were my business partner before Islam, and

you were the best of business partners. You never argued with me to withhold what was duly mine". It is also narrated that when the Prophet (pbuh) re-entered Makkah victorious, he (pbuh) said to him: "Welcome to my brother and partner, who never argued with me to withhold my rights".

As we have seen in our study of the Ḥanafī opinions on partnerships, a partnership is a contract whose objects are the capital and profits. In this regard, there have been many traditional and modern types of partnerships, with varying types of capital and work contributions, and varying degrees of legal responsibility and guaranty. Thus, capital partnerships are built upon capital, work partnerships are built upon labor and guarantee of work, and credit partnerships are built upon the creditworthiness of the partners.

We have also seen that the Ḥanafīs and Zaydīs have permitted both involuntary ownership partnerships, as well as voluntary contract partnerships. Of those different types of partnerships, we have seen that silent partnership (*mudāraba*) is one of the most useful. In this contract, one partner provides the capital while the other provides his effort. We have seen how this contract was permitted due to the economic benefits from allowing each partner to benefit from combining their respective financial endowments and abilities to generate profits. Such profits are then distributed according to agreed-upon ratios. However, if financial losses are incurred in a silent partnership, the capitalist incurs all such losses, while the entrepreneur implicitly loses his labor by not receiving any compensation thereof.

There are many new contracts that have emerged in contemporary times. Some of those partnerships are regulated in civil laws (e.g. joint liability companies or *sharikāt al-tadāmun*, simple partnerships or *sharikāt al-tawṣiyah al-basīṭah*), joint stock companies or *sharikāt musāhamah*, etc.), while others types (e.g. particular partnerships or *sharikāt muhāṣṣah*), etc.) are not regulated. It is important to study those modern partnership forms in light of Islamic jurisprudence, since they are commonly used, and some of them may in fact be Islamically invalid.

In this regard, the Jordanian civil law - which was derived from Islamic Law - concentrated on the legal status of general partnerships in items 582-610. The only specific rulings pertaining to a specific types of partnerships were addressed in items 711-635 and covered work partnerships (*sharikāt al-'aṣmāl*), credit partnerships (*sharikāt al-wujūh*), and silent partnerships (*sharikāt al-mudāraba*). The laws governing the first two types of partnerships were derived from the Ḥanafī and Ḥanbālī schools, while the laws governing silent partnerships was derived exclusively from the Ḥanafī school.

The Syrian and Egyptian man-made civil laws divided partnerships into two categories: associations of individuals (*sharikāt 'ashkhaṣ*) and associations of capital (*sharikāt 'amwāl*). The first type highlights the role of individuals and the mutual trust they put in one another, irrespective of their capital contributions. This category covers joint liability companies, limited partnerships, and particular partnerships. In contrast, associations of capital are fundamentally built on the contributions of capital, with the identities of partners playing a minor role. This latter type of partnerships covers joint stock companies, and

limited liability corporations.

33.1 Legal status of contemporary partnership forms

It is important to study each of the contemporary partnership forms individually, to determine the legal status of each from an Islamic viewpoint.

33.1.1 Joint liability companies (*sharikāt al-tadāmun*)

This type of partnership may have two or more individuals. The company may be restricted to one particular economic sector, or it may be unrestricted. In either case, the partners assume mutual responsibility for all of the company's obligations. Such responsibility extends beyond the amount of capital they contribute to the company, and the partners may indeed be forced to draw on their own personal property to meet the company's obligations.

We note that the mutual guaranty (*kafālah*) characteristic of this type of company is very similar to the unlimited partnership (*mufāwadah*) we discussed previously. The reader may recall that this type of partnership was permitted only by the Ḥanafis and Zaydīs, subject to equality of the partners in rights to use the company's capital, their respective capital shares, and religion. This equality of rights was required by those jurists to compensate for the equality of responsibility implied by the mutual guaranty condition. We have argued that this equality condition is very difficult to satisfy, and thus this form of the partnership is rarely of relevance.

The Islamic alternative to this form of partnership was limited (rein) partnerships ('*inān*), which did not require equality in capital contribution, rights to use the capital, or religion. However, this type of partnership normally would not include mutual guaranty. Thus, the majority of jurists agree that each partner would normally be responsible only for his own transactions, and that profits will be divided according to the ratios stipulated in the contract, while losses must be shared in proportion to capital shares. This opinion was based on the Ḥadīth: "Profits are divided according to agreed-upon ratios, but losses must be shared in proportion to capital shares". (On the other hand, Al-Shāfi'ī ruled that profit shares must also be proportional to capital shares.)

The Ḥanafi jurist Al-Kamāl ibn Al-Humām ruled that adding mutual guaranty to a rein partnership was not permitted. However, I find no harm in adding a condition of mutual guaranty in this case, based on the view that guaranty is a charitable contract. In fact, mutual guaranty was permissible by mutual consent, even without the partnership contract. Thus, it is more appropriate to permit it for individuals who share a partnership contract. In this regard, the mutual guaranty condition is in compliance with Islamic Law, and it becomes binding on the partners.

33.2 Simple partnerships (*sharikāt al-tawsiyah al-basītah*)

In this type of partnership, some of the capital-providing partners run the company and share liability and mutual guaranty for its obligations, while others only provide capital, and have limited liability. This type of partnership is also permitted, since jurists allow a rein partnership contract to include a condition that one of the partners must work. In this case, the partner who is given the extra responsibility to work for the company and bear responsibility for its actions may thus be given either a higher profit share, or a wage. In this regard, the number of partners responsible for running the company, and the number of those with limited liability, may be one or more. As we have seen in the previous section, it is permissible to divide the partners into two groups, one bearing liability for the company's actions and the other bearing only limited liability.

Moreover, this type of partnership may be validated as a form of silent partnership (*mudāraba*). Under this interpretation, the working partners who bear the higher liability are considered the entrepreneurs, while the other partners are considered the capitalists. In this case, the entrepreneurs are not responsible for any losses incurred from action that were approved by the capitalists, and they are generally permitted to undertake any conventional actions undertaken by similar entrepreneurs. Finally, as a silent partnership, profit shares may be determined by mutual consent of all the partners, and stipulated in the contract.

Thus, those partnerships differ from silent partnerships in few insignificant details. On the other hand, we need not dwell on those details since joint stock companies have all but made simple partnerships extinct. The former style of partnerships has more freedom in raising capital and branching into different economic sectors. This higher freedom made joint stock companies a more popular vehicle for investors seeking a limited liability investment vehicle.

33.3 Particular partnerships (*sharikāt muhāssah*)

This type of partnership is usually temporary, and thus the partnership never gets defined as a juristic personality. Two or more partners contribute to this temporary partnership with capital, labor, or both, and they share profits and losses according to agreed-upon rules. Its temporary nature is usually dictated by the circumstances. For instance, such a partnership may only survive for the duration of an auction, or to perform one major transaction, whereby only one of the partners may act, seemingly on his own, but in reality on behalf of the partnership. Soon thereafter, profits or losses are distributed, and the partnership is dissolved without the public knowing of its existence.

In general terms, this is a permissible form of limited partnerships (*'inān*), without any requirements of equality or mutual guaranty. This partnership is usually restricted to a specific business sector, but as with all limited partnerships, profits may be distributed as agreed in the contract, while losses must be

distributed in proportion to capital shares.

To be more specific, the company is considered a general limited partnership if all partners' shares are held in common property, and it is considered a combination of limited and silent partnerships if each partner retains ownership of his capital share. In the latter case, the silent partners are considered to retain ownership of the capital, and to have delivered it to the entrepreneurs in the silent partnership component to invest with the rest of the capital, for the benefit of all the partners. The active partners in this case act simultaneously as entrepreneurs in the silent partnership component, as well as acting as a limited partner for their own share of the capital. This combination of two types of partnerships (a silent partnership and a limited partnership) in one is permissible, in analogy to the permissibility of unlimited partnerships that are combinations of three types in one (a limited partnership, a credit partnership, and a labor partnership). In this regard, if each of the component partnerships is permissible on its own, they are permissible in conjunction within a single partnership.

33.4 Joint stock companies (*sharikāt musāhamah*)

This is perhaps the most important contemporary form of capital partnerships. In this form, the company's capital is divided into many small indivisible tradable portions that are equal in value, each called a common stock or share. Each investor's liability is limited to the nominal value of the shares that he holds. The managers and workers of the company are considered employees of the shareholders, thus receiving wages for their efforts whether or not they are themselves shareholders. In this type of company, the manager may not make the company indebted by an amount exceeding its capital. If he does in fact cause the company to incur such an excessive debt, he must guarantee it himself, and the shareholders continue to be liable only up to the value of their shares. Profits in such a company are distributed in proportion to capital shares.

This type of company is often called an anonymous partnership, since the identities of shareholders are irrelevant, and they may not know one another. Moreover, the shareholders' knowledge about the company's actions and financial positions usually relies on periodic reports provided by the company's management. Man-made legal systems tend to restrict this type of partnerships to large-scale companies (e.g. in textiles, steel, etc.) that require raising large amounts of capital through sales of common stock to many small investors.

This type of partnership is also permissible in Islām as a limited partnership built upon mutual consent of the shareholders. The board of directors of such a partnership is considered a legal agent of the shareholders. In this regard, there is no legal requirement that prohibits the multiplicity of the shareholders, or the limited liability of each to the value of his shares. The latter limited liability is identical to that in the permissible silent partnership contract, where each capitalist can lose no more than the capital he contributed to such a partnership. The continuation of a joint stock company is also permissible as long as all the

shareholders agree to it, since such a condition is not at odds with Islamic law. On the other hand, while issuing common shares is permissible for such companies, the common practice of issuing interest-paying bonds is forbidden due to the prohibition of *ribā*.

33.5 Hybrid limited partnerships or *sharikāt al-tawṣiyah bi-l-'ashum*)

This type of partnership consists of two sets of partners, many of whom hold tradable common shares and have limited liability (*al-musāhimūn*), while a few others provide full guaranty for one another, thus bearing unlimited liability (*al-mūṣūn*). This type of partnership is permissible as a special case of rein (*inān*) partnerships, whereby some of the partners provide full mutual guaranty for one another. In this regard, the unlimited liability partners' addition of voluntary guaranty (*kafālah*) is permissible, and their actions on behalf of the partnership are permissible by shareholder consent. Thus, the unlimited liability partners would be considered entrepreneurs in a silent partnership, and they are governed by all the rules of such partnerships. As we have seen previously, combining the rein and silent partnership forms in one partnership is permissible.

33.6 Limited liability companies

The Arabic name for such companies is literally *sharikāt dhāt mas'ūliyyah mahdūdah*. Civil laws qualify this common form of anonymous capital partnerships by limiting the number of partners to fifty or less. Each partner's liability is limited to his capital share, and if a partner dies, his capital share is bequeathed to his heirs. The company's management may consist of partners or others, and they receive an increased share in profits or fixed wages as entrepreneurs in a silent partnership or hired workers, respectively. In this regard, the company is very similar to associations of capital. On the other hand, the company is also similar to associations of individuals since each partner is a full owner of a capital share rather than a holder of tradable common shares. Thus, raising capital for this type of company requires individual partners to directly contribute to the company's capital, in contrast to public offerings of tradable shares through which capital is raised for joint stock companies. This type of company is also permissible as a special form of rein partnerships, with the possibility of adding a silent partnership component. In this regard, each partner's limited liability to his capital share is very similar to the capitalist's limited liability to his invested capital in a silent partnership.

33.7 Summary of common modern partnerships

Thus, we see that the modern partnership forms regulated in civil laws are easily understood in terms of the basic forms studied in Islamic Jurisprudence. In this regard, the basic forms of those partnerships agree with the forms studied by classical jurists, with a few developments that are necessitated by modern needs and conventions. In general, we may say that associations of individuals are more similar to silent partnerships in Islamic jurisprudence, with a few variations dictated by the nature of modern economies. On the other hand, associations of capital are in general similar to limited partnerships, with possible added features of unlimited partnerships and silent partnerships (for limited liability partners). In all such partnerships, management is in general a form of agency, for which the managers may receive wages as hired workers, or the wages may be paid in the form of an increased profit share if the managers are themselves partners.

33.8 Transportation vehicle partnerships

It is a common practice nowadays for a number of individuals to own a transportation vehicle jointly. Usually, one of the partners would also operate the vehicle and collect a wage for his labor. In certain instances, a driver who was not initially a partner may be included in the partnership, and in this case he may pay for his share in the vehicle from his future profit shares.

All such practices are permissible, since partnerships are generally permissible based on convention. Moreover, partners may contribute to the partnership in many ways, including liability, credit, work, or capital. Partners' actions can then be validated as forms of legal representation and/or guaranty. Allowing for all the different combinations, the vehicle operator may collect a fixed wage as well as a profit share, or the wages may themselves be specified as a profit share. All such practices can be related to traditional contract forms to show that they are indeed permissible, as we have shown for payment schemes of managers of unlimited and joint stock companies. We have also shown that combining two partnership forms, or a partnership and a hiring, in one contract is permissible. In fact, the Shāfi‘īs and Mālikīs explicitly permitted such joining of two contracts in one by analogy to crop sharing. In fact, the general prohibition of two contracts in one or two conditions in one contract may be overruled if the purpose behind the prohibition (avoidance of enmity or dispute) does not apply to the case at hand. The practices we discussed here are conventional means of attaining valid economic benefits, and there is no danger of causing dispute or enmity. Hence, the contracts thus described are permissible.

33.9 Partnerships in livestock

It is common nowadays to establish partnerships in raising cattle and sheep, whereby some partners provide the capital and others provide the labor (feed-

ing, cleaning, etc.). Such partnership forms are permissible provided that no excessive ignorance is present in the contract, lest enmity result from such practices. However, tolerable minor uncertainty that is expected in practice does not render the contract impermissible. In what follows we list a few consequences of this general rule:

1. If one partner pays the full price for buying the livestock, and the other partner is responsible for keeping the animals and feeding them at his own expense, the partnership is not valid. In this case, the amount of food that the second partner must buy is subject to excessive uncertainty that may lead to dispute. Thus, the contract is rendered defective.
2. If the contract stipulates that the animal feed is to be bought out of the proceeds from selling their milk, and that the rest of milk proceeds is to be distributed among the partners, the partnership is not valid. In this case, the proceeds from selling the milk may and may not be sufficient to feed the animals. On the other hand, if the capitalist also bears the responsibility for covering the remaining cost of feeding the animals, then the contract is valid.
3. The partnership is valid if the capitalist bears all costs, including the financial costs of upkeep and feeding the animals, while the entrepreneur only bears responsibility for the labor associated with keeping the animals and feeding them. In this case, the contract is a valid silent partnership. In this regard, some of the Ḥanafīs argued that the worker should not deserve compensation (profit share) in this contract since they ruled that feeding the animals is not real work, based on the view that animals eat by themselves. However, this opinion is not valid, since the worker's labor is still essential for providing the animals with the appropriate food at the appropriate time, as well as cleaning and taking care of the animals. This type of labor clearly contributes to the well-being and productivity of the animals, and thus the worker in this case deserves his share of profits.
4. If two individuals share in all costs of buying, keeping, and feeding the animals, and then if one of them volunteers his labor in keeping the animals, the partnership is valid. In this case, the partnership is established purely on the basis of capital sharing, and the voluntary labor is excluded from the formula.
5. The most common practice today is this: two partners share in the price of buying the animals. Then, the one who provides his labor collects all of the animals' milk and butter as compensation for his labor, while wool is divided equally between the two. The *fatwā* committee of Al-'Azhar ruled in 1948 C.E. that this partnership form is valid, based on economic need as well as conventional usage. In this regard, there is no explicit Legal Text in the Qur'ān, Sunnah, or 'Ijma^c forbidding this contract, and the practice is very unlikely to result in disputes and enmity between the

partners. Thus, they ruled that the uncertainty in this common practice is minor, and the contract is rendered valid.

In summary, we have seen that Islām is a religion of ease, and Islamic Law does not introduce unnecessary hardships. Therefore, common economic practices that do not disagree with Islamic Law are mostly permitted in Islām. The fact that those common practices change over time is indeed necessary for the health of the economy, and Islamic jurists are required to study those practices to ensure that they do not disagree with the Law.

Part IX

The Gift Contract (*al-hibah*)

Preliminaries

The gift contract will be studied in six chapters:

1. Definition and legality of gifts.
2. Cornerstones of the gift contract.
3. Conditions of the gift contract.
4. Legal status of the contract.
5. Factors that preempt recalling gifts.
6. Gifts to children.

Chapter 34

Definition and Legality

There are two categories of gifts: presents given to please the recipient, and charities given to please Allāh (swt). Jurists define the gift contract as: “A voluntary contract that results in uncompensated ownership transfer between living individuals”.¹ The Ḥanbalīs gave it the following more specific definition: “It is a contract initiated by an eligible party to transfer ownership of existent and deliverable properties to another without compensation. The properties may be known or unknown, but they must be conventionally given as gifts, and the contract language must specify that it is a gift or a property transfer, etc.”.² The use of “property transfer” in those definitions is stipulated to exclude loans, as well as the transfer of non-valued properties (e.g. animals that may not be owned). Other conditions exclude gifts in undeliverable objects (such as an unborn animal in its mother’s womb), and considering legal obligations such as alimony and spousal expenses to be gifts. Also, the donor is required to be alive to exclude inheritance from this contract. Finally, the condition of having no compensation for the gift is required to exclude commutative contracts.

There are Qur’anic verses that permit and recommend gift-giving. For instance, we may cite the verse: “But if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer” [4:4]. Another verse that enjoins Muslims to give charitable gifts urges the Muslims to be like the one who “spends of the wealth that he cherishes, to his kinfolk, orphans, the needy, the wayfarer, ...” [2:177].

There are also many *Hadīths* that urge Muslims to give gifts. In one *Hadīth*, the Prophet (pbuh) is narrated to have said: “Exchange gifts so that you may love one another”.³ The Prophet (pbuh) was also narrated to have said: “Do

¹ Al-Khatīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.396), ’Ibn Qudāmah (, vol.5, p.591), ’Ibn Al-Humām ((Ḥanafī), vol.7, p.113), ’Ibn Ḩabīdīn ((Ḥanafī), vol.4, p.530).

² Marī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, p.328), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.329).

³Narrated in all major books of *Hadīth* on the authority of ’Abū Hurayrah, Ḩabdullāh ibn Ḩamr, Ḩabdullāh ibn Ḩumar, and Ḩāfi’ishah (mAbpwt). It was also narrated elsewhere with an incomplete chain of narration. Thus, Al-Bukhārī in *Al-Adab Al-Mufrad*, ’Abū Ya’lā, Al-Bayhaqī, and ’Ibn Ḩadiyy narrated on the authority of ’Abū Hurayrah. Ibn Hajar ruled

not underestimate the significance of a neighbor's gift to her neighbor, even if it is only a sheep's foot".⁴ He (pbuh) also admonished those who recall their gifts by saying: "The one who recalls his gift is like the dog, who eats his vomit".⁵ Moreover, it was the Sunnah of the Prophet (pbuh) to reward a gift with another as soon as the donee has a chance to give the donor. This is documented in Al-Bukhari based on the *Hadith* narrated by 'Abisha (mAbpwh) that "the Prophet (pbuh) used to accept gifts, and reward the donor".

There is a consensus that all forms of gifts are commendable. In this regard, jurists cite the verse "help one another in righteousness and piety" [5:2]. It is also established that gifts to relatives are better than gifts to others,⁶ based on the verse: "Fear Allāh through whom you demand your mutual rights, and reverence the womb-relationships" [4:1]. Moreover, Al-Bukhari and Muslim narrated a *Hadith* in which the Prophet (pbuh) was narrated to have said: "Whoever wishes Allāh to increase his wealth and prolong his life, let him do acts of kindness towards his womb-relatives".

The major jurists of all juristic schools have agreed that the gift contract becomes valid through three components: offer, acceptance, and receipt. They also agreed that fulfilling the promise to give a gift is highly desirable. Finally, they all agreed that it is reprehensible for a parent to show unequal treatment of one's children, e.g. by giving gifts to some to the exclusion of others.⁷

that its chain of narration is good (*'isnāduhu ḥasan*) due to its multiple narrating witnesses, despite the fact that every line of narration includes questionable links. Al-Hakim narrated the *Hadith* on the authority of 'Ibn 'Amr, and 'Ibn Al-Qasim Al-'Asbahani narrated it in *Al-Targhib wa Al-Tarhib*. The narration on the authority of 'Abisha was narrated by Al-Tabarani in *Āl-'Ausat*. The narration with an incomplete chain (*mursal*) was documented by Malik in *Al-Muwatṭa'* on the authority of 'Ata' Al-Khurasani. See Al-Hafiz Al-Zayla'i (1st edition, (*Hadith*), vol.4, p.120), Al-San'anī (2nd printing, vol.3, p.92), Al-Shawkani (, vol.5, p.347), 'Ibn Hajar (, p.259).

⁴Narrated by Al-Bukhari, Muslim, and Al-Tirmidhi on the authority of 'Abū Hurayrah (mAbpwh), c.f. 'Ibn Al-'Athir Al-Jazarī (, vol.12, p.262), 'Ibn Hajar (, p.259), Al-San'anī (2nd printing, vol.3, p.93).

⁵Narrated in the major six books of *Hadith* on the authority of 'Ibn 'Abbas as follows: "We [Muslims] should not be similar to bad examples. The example of one who recalls his gift is like the dog who eats his vomit", c.f. 'Ibn Al-'Athir Al-Jazarī (, vol.12, p.265), Al-Hafiz Al-Zayla'i (1st edition, (*Hadith*), vol.4, p.126).

⁶Al-Sarakhsî (1st edition (Hanafi), vol.12, p.47 onwards), as well as earlier references.

⁷Al-Sha'arani ((Shafi'i), vol.2, p.99), 'Ibn Al-Humam ((Hanafi), ibid.).

Chapter 35

Cornerstones

The Ḥanafīs use reasoning by analogy to sales contracts to rule that the two cornerstones of the gift contract are offer and acceptance. Al-Sarakhsī (1st edition (Hanafi)) ruled by juristic approbation to add receipt of the gift as a third cornerstone, since it is a necessary condition to establish ownership in a gift contract but not in sales. On the other hand, Al-Kāsānī ((Hanafi)) and some other Ḥanafīs excluded acceptance from the list of cornerstones of the gift contract. This ruling is based on the view that the offer by itself effects the gift contract, while acceptance is only necessary to effect its consequences in terms of transferring ownership to the recipient.

This juristic difference over the list of cornerstones of the contract can be illustrated through the following example. If an individual swears that he will not give an item as a gift to another, and then he proceeds to offer him that same item as a gift: juristic approbation would suggest rescinding the gift offer, while reasoning by analogy would not. The majority of Ḥanafi jurists resolve this difference by arguing that the gift contract is concluded through offer as far as the donor is concerned, but requires both offer and acceptance as far as the donee is concerned.¹ This reasoning is based on the view that gift-giving is a charitable contract, which is effected for the donor through offer (in analogy to bequests), but ownership is only effected for the donee through acceptance. On the other hand, item #837 of *Al-Majallah* stated that “a gift contract is concluded through offer and acceptance; and it is effected with receipt”.

The non-Ḥanafi jurists enumerate four cornerstones for the gift contract: donor, donee, object, and contract language:²

- The donor is the owner of the object of the gift, provided that he is eligible to give a gift. Thus, if a sick person were to offer a gift and then die, the majority of jurists ruled that his gift must be within the discretionary one-third of his estate.

¹ Al-Sarakhsī (1st edition (Hanafi), vol.12, p.57), Al-Kāsānī ((Hanafi), vol.6, p.115), 'Ibn Al-Humām ((Hanafi), vol.7, p.113), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.531), 'Ibn 'Ābidīn ((Hanafi), continuation vol.2, p.329).

² 'Ibn Juzayy ((Mālikī), p.366), *Hāshiyat Al-Dusūqī* (vol.4, p.97 onwards).

- The donee maybe any human being. Thus, jurists agree that it is permissible for someone to give all of his property to a stranger (i.e. someone who is not a family member). On the other hand, while the majority of jurists render permissible giving all of one's property to some children to the exclusion of others, or distributing gifts unequally to the offspring, they consider it reprehensible.
- Any owned property is eligible for being the object of a gift.
- The gift contract language may consist of any words or actions that indicate offer and acceptance.

35.1 Unrestricted gift offers

The donor may use explicit language for the offer (e.g. “I give you this item as a gift”), or it may be implicit in language commonly used for giving gifts (e.g. “this is yours”), provided that the donor had the proper intention of giving the item as a gift. In either case, transfer of property without compensation is a gift, regardless of the precise language used in the offer.

However, offers need not be unrestricted. Indeed, there are three types of restrictions that may be attached to a gift offer resulting in three types of offers: (i) temporal gift offers, (ii) conditional gift offers, and (iii) usufruct gift offers. We discuss each of those offer types in greater details in the remainder of this chapter.³

35.2 Temporal gift offers (*^cUmrā*)

It is conceivable that a person would extend the following offer to another: “I have given you this house for the duration of life”, or “for the duration of my life”. This was a common practice in pre-Islamic times, called a lifetime-gift (*^cumrā*), and its temporal condition was invalidated in Islamic Law. Under this practice, if the gift was given for the duration of the recipient’s life, then it would be returned to the donor or his heirs upon the recipient’s death. On the other hand, if the gift was given for the duration of the donor’s life, then it must be returned to the donor’s heirs upon his death. The Prophet (pbuh) invalidated the temporal component of those gifts by saying: “Keep your properties rather than giving them as temporal gifts. If you give something as a temporal gift, it becomes the recipient’s property permanently”.⁴ Thus, the transfer of

³Al-Kāsānī ((Hanafi), vol.6, p.116 onwards).

⁴Narrated by Al-Bukhārī, Muslim in *Al-Muwatta'*, 'Ahmad and the four authors of the *Sunan*. The narrations were all made on the authority of Jābir ibn ^cAbdillāh, but they vary in their language. The language used in Al-Bukhārī and Muslim is “temporal gifts are the permanent property of the donee”. Another narration in Muslim, which is also found in 'Ahmad is thus: “Keep your properties instead of spoiling them [through temporal gifts]. Indeed, whoever gives a temporal gift, the gift belongs to the donee if he is alive, and then it becomes the property of the donee’s heirs”, c.f. 'Ibn Al-'Athīr Al-Jazarī (, vol.9, p.112), Al-Shawkānī (, vol.6, p.13), Al-Šan^cānī (2nd printing, vol.3, p.93).

property from the donor to the donee is effected, but the temporal condition is voided. In this regard, the temporal restriction is considered a defective condition. However, unlike the case of commutative financial contracts (e.g. sales, where combining a sale and a condition in one contract was forbidden in the *Hadīth*), a defective condition does not affect the gift contract itself.

35.3 Provisional gift offers

A common pre-Islamic example of conditional gift offers is the one whereby the donor stipulates that if he dies first, the gift becomes the permanent property of the donee. On the other hand, he stipulates that if the donee dies first, the gift must be returned to the donor. Jurists differed over the legal effects of such an offer:

- 'Abū Ḥanīfa and Muḥammad ruled that if the potential donor makes such a conditional gift offer, the object of the gift is considered lent to him, and the donee may demand it at any time. As proof, they cited a *Hadīth* that stated that the Prophet (pbuh) permitted temporal gifts but invalidated such death anticipation conditions (*ruqba*).⁵ In this regard, the condition under which the gift may be returned makes the donee's ownership imperfect, since it is dependent on a random event. Since such random elements are not permissible in a transfer of ownership, the gift delivery is rendered a simple loan, under which the donee/borrower may derive usufruct from the object.
- 'Abū Yūsuf, the Shāfi'īs and the Ḥanbalīs ruled that if the donee gains possession of the gift object, then it is considered a permanent gift, thus invalidating any temporal or conditional constraints on the gift.⁶ They derive proof from the *Hadīth* that the Prophet (pbuh) permitted receipt of temporal and conditional gifts.⁷

⁵ Al-Ḥāfiẓ Al-Zayla^{cī} (1st edition, (Hadīth), vol.4, p.128) classified this *Hadīth* as a questionable and strange one (*gharīb*).

⁶ Ibn Qudāmah (, vol.5, p.624), Al-Sharqāwī ((Shāfi'ī), p.172).

⁷ This *Hadīth* is established based on the previously cited narration on the authority of Jābir, which said that "Temporal gifts are permissible for their recipients". This *Hadīth* was narrated by Al-Tirmidhī and 'Ibn Mājah, and there are many other *Hadīths* that carry a similar meaning. One such *Hadīth* was narrated by Al-Nasā'i and 'Ibn Mājah with a full chain of narrators (*Hadīth marfū'*) ending with 'Ibn 'Umar, that the Prophet (pbuh) said: "There are no temporal or conditional gifts, thus the recipient of such gifts become their owners, alive or dead". Another similar *Hadīth* was narrated by 'Abū Dāwūd, Al-Nasā'i, 'Ibn Mājah, 'Aḥmad in his *Musnad*, and 'Ibn Hibbān in his *Sahīh*, on the authority of Zayd ibn Thābit that the Prophet (pbuh) said: "Whoever gives a temporal gift, it becomes the permanent property of its donee through life or death. Also, do not give *ruqba*, for if you do, then the object becomes property of the donee". There are many other narrations including one narrated by Al-Nasā'i on the authority of 'Ibn 'Abbās, one narrated by Al-Tirmidhī on the authority of Samurah ibn Jundub, and others, c.f. 'Ibn Al-'Athīr Al-Jazarī (, vol.9, pp.111-115), Al-Ḥāfiẓ Al-Zayla^{cī} (1st edition, (Hadīth), vol.4, p.128), Al-Shawkānī (, vol.6, p.12 onwards), Al-Ṣanānī (2nd printing, vol.3, p.91), 'Ibn Hajar (, p.260).

- The Mālikīs agreed with the Hanafī permission of temporal gifts and invalidated conditional gifts.⁸ They defined temporal gifts as an uncompensated gift of usufruct of real estate or another object for the duration of the donee's life, after which the object of the gift is returned to the donor or his heirs. They defined conditional gifts as we defined it above.
- Thus, in summary, most jurists permitted both temporal and conditional gifts as special types of gifts that require offer, acceptance, receipt, etc. However, the Hanafīs and Mālikīs permitted temporal gifts but forbade conditional gifts.

35.4 Usufruct gift offers

The Hanafīs agree that if a person gives the usufruct of an object (e.g. a house) as a gift to another, then the house is considered to be loaned to the usufruct donee. On the other hand, if the object from which the usufruct is to be derived can only be used by consumption (e.g. food), then a gift of usufruct is tantamount to a full gift. Thus, depending on whether or not the object itself survives after the donee collects its usufruct, the contract may be considered a loan or a gift. They stated this classification as follows: loans of non-fungibles imply a transfer of ownership of the usufruct, while loans of fungibles (including money and goods measured by weight or volume) imply ownership of the lent goods.⁹ Thus, a loan in the first case would be a loan of the usufruct of the lent items, and a loan in the second case would be a loan of the items themselves.

Thus, the Hanafīs argued that if the donor specified that he gave a house as a lifetime gift (*"umrā"*), one must understand that the contract is in fact a loan. In this regard, the donee derives usufruct from the house until his death. This is similar to the case where the donor specifies the gift as "residence in the house", whereby the house itself would be considered a loan. In all such circumstances, the offered gift is in fact the usufruct of property.¹⁰

On the other hand, if the donor were to say "this house is yours as charity, so that you may live in it", or "this house is yours for the rest of your lifetime, so that you may live in it", then it is in fact treated as the charity or gift he specified, without paying attention to his statement of how it must be used. In such cases, once the usufruct of the property is given to the donee of the charity or gift, the donor no longer owns that usufruct, and he cannot specify how it must be used. Thus, this is rendered to be a defective contract, but the gift remains valid, since it is not affected by defective conditions, as we have seen previously.¹¹

⁸ Al-Dardīr ((Mālikī)A, vol.4, p.97 onwards).

⁹ Al-Kāsānī ((Hanafī), vol.6, p.215).

¹⁰ Al-Kāsānī ((Hanafī), vol.5, p.118), 'Ibn Al-Humām ((Hanafī), vol.7, p.120).

¹¹ Al-Kāsānī ((Hanafī), vol.6, p.117-118), 'Ibn 'Abidīn ((Hanafī), vol.4, p.532).

Chapter 36

Contract Conditions

The gift contract conditions pertain either to the donor, or to the object of the gift. The Ḥanbalis enumerated eleven conditions for the gift contract:¹ (i) the donor must be eligible, (ii) he must be giving the gift voluntarily and (iii) seriously, (iv) the given property must be eligible for sale, (v) the gift must be uncompensated, (vi) the donee must be eligible to own the property, (vii) the donee or his legal guardian must consent to receiving the gift, (viii) the acceptance must follow the offer without any interruptions, (ix) the gift must be delivered as specified, (x) it must not be temporal, and (xi) the object of the gift must be property from which benefits may be derived.

The Shāfiīs stressed the importance of having no legal interruption between the offer and acceptance. They also stipulated that the gift contract should not be restricted by any conditions, since a gift is a transfer of property that does not allow uncertainty based on the condition satisfaction or lack thereof. They also stipulated that the gift contract must not be temporally limited (e.g. a gift for one year), since a gift is a transfers of property (like sales), and such property transfers must be permanent.

In what follows, we discuss each set of gift contract conditions in greater detail.

36.1 Conditions for donors

The donor must be eligible to give his property voluntarily to another for the gift contract to be concluded. Hence, he must be sane, and of legal age. In this regard, voluntary giving away of property is a pure financial loss, and requires eligibility of the owner. Hence, jurists agree that a father may not give away his young child's property as an uncompensated gift. The legal guardianship in this case is restricted to beneficial dealings in the child's property.

¹Marṣī ibn Yūsuf (1st printing (Ḥanbali), vol.2, p.334), Al-Buhūtī (3rd printing (Ḥanbali), vol.4, p.329).

If the father gives a gift out of his young child's property, with a stipulated condition of compensation, then we have a difference of opinions among the Ḥanafīs. Thus, 'Abū Ḥanīfa and 'Abū Yūsuf still consider the contract impermissible. Their logic is that the contract thus consists of a voluntary gift that is later converted to a sale. Since they ruled that the father does not have the right to conclude the first voluntary gift component, the entire contract becomes impermissible. In contrast, Muḥammad ruled that the essence of the gift contract with compensation in fact renders it a sale, and thus permits it by concentrating on the essence of the contract rather than its form.²

36.2 Conditions for the gift object

There are many conditions pertaining to the object of a gift contract. In what follows, we study those conditions in some detail.

36.2.1 Existence at gift time

The Ḥanafīs ruled that the object of a gift must exist at the time the gift is made, otherwise the contract is not concluded.³ Thus, they consider gifts of whatever fruits he will get this year, or the offspring of his sheep, as invalid contracts that transfer the property of non-existent objects.⁴

The Ḥanafīs give many examples of probable or non-existent items that are not eligible for gift giving, including an unborn calf, flour in the form of wheat, butter within milk, etc., even if the donor stipulates that the donee may take the object once it exists. In such cases the object of the gift did not exist at the time of the contract, and hence they ruled that the contract was never concluded. In all such cases, they render the contract invalid.

On the other hand, they render the contract defective in some cases, whereby the gift object may be separated rendering the gift permissible. Examples of such gift objects include milk in the udder, wool on the backs of sheep, plants in the ground, and dates on a palm tree. In such cases, they ruled that the object of the gift in fact exists at the time of the contract, and its ownership is in fact transferred to the donee upon conclusion of the contract. However, the contract was considered defective due to non-executability caused by the joining of the gift object with other objects. Thus, once the gift object is separated, the gift is rendered valid.⁵

² Al-Kāṣānī ((Ḥanafī), ibid.).

³ Al-Sarakhsī (1st edition (Ḥanafī), vol.12, p.71), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.124), Al-Kāṣānī ((Ḥanafī), vol.6, p.119), 'Ibn Ḩāfiẓ ((Ḥanafī), vol.4, p.534), Ḩāfiẓ Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.172), 'Ibn Ḩāfiẓ ((Ḥanafī), vol.2, p.329).

⁴ On the other hand, the Mālikīs argued that *gharar* does not affect the validity of a gift contract. Thus, they permitted gifts of unknown objects, non-existent objects, and probable objects, e.g. runaway animals, un-ripened fruits, etc. In general, all goods that cannot be sold due to *gharar* are deemed eligible for gift-giving by the Mālikīs, c.f. 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.324), 'Ibn Juzayy ((Mālikī), p.367).

⁵ Al-Kāṣānī ((Ḥanafī), vol.6, p.119). We note however, that the Ḥanafī references Al-Ṭahāwī ((Ḥanafī)) and Al-Kāṣānī ((Ḥanafī)) render gifts of milk in the udder and wool on the backs

The Shāfi‘īs and Ḥanbalīs agreed with the Ḥanafīs on the general rule that whatever can be sold can be given as a gift. The Mālikīs also permitted giving certain non-sellable items as gifts, including runaway animals, unknown items, un-ripened fruits, and usurped objects.

36.2.2 Gift must be valued property

Thus, it is not permissible to give as gift an item that is not a property, e.g. free people, etc. Also, non-valued properties such as wine may not be given as gifts.⁶ Thus, the sale of a non-property or a non-valued property would not be considered a concluded contract due to the impermissibility.

36.2.3 Gift must be a private property

Thus, it is not permissible for a person to give a public property as a gift to another. If one does, it is not considered a concluded contract.⁷

36.2.4 Donor must be the owner

If a person gives another person's property as a gift, the Ḥanafīs ruled that contract is not executable, unless the owner permits it. This follows from the inability of the non-owning donor to transfer ownership of what he does not own.⁸ On the other hand, the Ḥanafīs permit giving any item as a gift, even if it is a liability on another. Thus, it is permissible in their school to give a debtor his debt as a gift, based on the deliverability of the liability. As we shall see later, it is also permissible to give the debt as a gift to a third party if the gift-recipient is explicitly authorized to collect the debt.

36.2.5 Gift object must be separate

Thus, the Ḥanafīs ruled that it is not valid to give a share in a divisible common property (e.g. an apartment building) as a gift. They consider such a gift contract defective. This ruling is based on the view that gifts, in analogy to pawning, require delivery of the gift or pawned object. In this regard, unidentified shares in common property cannot be delivered, since the owner of such a share cannot deal in that share without dealing in the whole. Since the contract over the share does not extend to the whole property, and without dividing the property to deliver the given share, receipt would not be effected.⁹ However, if the common property were in fact divided between the owners, and the donor

of sheep invalid. However, the better opinion is that reported in 'Ibn 'Ābidīn ((Hanafi)), rendering the gift defective only rather than invalid.

⁶ Al-Kāsānī ((Hanafi), ibid.).

⁷ Al-Kāsānī ((Hanafi), ibid.).

⁸ Al-Kāsānī ((Hanafi), ibid.).

⁹ Divisibility of a property is determined by whether or not the object would be negatively impacted by division, c.f. 'Ibn Al-Humām ((Hanafi), vol.7, p.121), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.533).

delivered an appropriate part thereof to the donee, then the contract becomes valid.

On the other hand, they ruled that it is permissible to give a share in non-divisible common property (e.g. a car) as a gift. This permission was ruled due to the potential need to give such a share as a gift, and giving access to the property is considered delivery of the gift in this case.¹⁰

In contrast, the Mālikīs, Shāfi‘īs and Ḥanbalīs ruled that giving an unidentified share in a common property is permissible, in analogy to the permissibility of selling such a share. In this regard, they ruled that receipt in the case of such a share given as a gift is effected in the same manner as its delivery in a sale. In both cases, delivery of the share is effected through delivery of the entire property, whereby the donee collects his right, and the rest of the property is considered a deposit or trust in his possession.¹¹ As proof for this opinion, they cite the narration that the delegation from Hawāzin came to the Prophet (pbuh) demanding that he returns the spoils of war he had won from them, and the Prophet (pbuh) said: “Whatever belongs to me or the entire family of ‘Abdul-Muṭṭalib is yours”.¹² In fact, what the Prophet (pbuh) gave as a gift in this *Hadīth* is his unidentified share in the common property of his family, and he gave that gift as unidentified shares to two or more people.

This difference in opinion between the Ḥanafīs and the other schools leads to different conclusions with regards to giving unidentified shares in common property as charity to a rich person. Charity to such a person is in fact a gift or present, and thus the Ḥanafīs would render it impermissible. On the other hand, all jurists agree that giving unidentified shares in common property as charity to multiple poor individuals is permissible, since the recipient of the charity - as far as the donor is concerned - is in fact Allāh (swt), and there are no shares to consider. In what follows, we consider in some detail the juristic consequences of the Ḥanafī ruling on shares in indivisible common property.¹³

Multiple donors or donees

’Abū Ḥanīfa ruled that the contract is invalid if common ownership of the gift object is present at the time of receipt. On the other hand, ’Abū Yūsuf and Muḥammad ruled that a gift contract is rendered invalid only if common ownership was established both at contract time and at delivery time.

¹⁰ Al-Sarakhsī (1st edition (Ḥanafī), vol.12, pp.64,74), Al-Kāsānī ((Ḥanafī), ibid.), ’Ibn Al-Humām ((Ḥanafī), vol.7, pp.121-128), ’Ibn Ḩābidīn ((Ḥanafī), vol.4, p.534).

¹¹ ’Ibn Juzayy ((Mālikī), [367]), ’Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.323), *Hāshiyat Al-Dusūqī* (vol.4, p.97), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.446), ’Ibn Qudāmah (, vol.5, p.596).

¹² Al-Shawkānī (, vol.8, p.3). This is also supported by the *Hadīth* narrated by Al-Bukhārī and Muslim o the authority of ’Abū Qatādah that he caught a wild donkey, and gave it to his friends as common property, so that they each had an unidentified share, and the Prophet (pbuh) approved the practice.

¹³ Al-Kāsānī ((Ḥanafī), vol.7, pp.121,122).

1. Multiple donees

This leads to disagreements among the three over the case where one donor gives a gift (e.g. a house) to two donees:

- 'Abū Ḥanīfa ruled that if one person gives a gift to two, the two will share in the property at the time of receipt, and therefore, the gift is rendered invalid in his opinion. On the other hand, 'Abū Yūsuf and Muhammad rendered the gift valid, since common ownership did not exist at the contract time.
- However, if the owner of a house stated the gift offer as follows: "I give half of the house to you, and the other half to the other", then 'Abū Yūsuf and Muhammad would render the gift invalid. In this case, not only would common ownership exist at the time of receipt, but it is effected at the contract time.
- The last case should be distinguished from an offer "I give this house to the two of you; half to you, and half to the other". In this case, 'Abū Yūsuf and Muhammad would consider the contract valid, since it is concluded as soon as he said "I give the house to the two of you". The second part of his statement is viewed as a post-contract recommendation of how to divide the property. Thus, common ownership was not present during the contract time.
- On the other hand, if the donor made the statement: "I give this house to the two of you; a third for you and a two-thirds for him", Muhammad continues to consider the gift valid, while 'Abū Yūsuf changed his ruling because of the unequal sharing rule. This change of opinion was caused by 'Abū Yūsuf's view that the gift was established at contract time to be for both of them, and thus must be shared equally. In this regard, he argued, unequal shares can only be established if common property was established at the contract time through two separate contracts. Such common ownership is also established at receipt, and hence, he ruled that the gift in this case is invalid.

Of course, 'Abū Ḥanīfa invalidated the contract in all four cases, since he rendered common ownership at delivery time a sufficient reason for invalidating the gift.

2. Multiple donors

On the other hand, all three jurists agreed that if two individuals have common ownership of an object, and then give it as a gift to a third person, the gift is valid. This follows, since there is no common ownership at the time of receipt. We have already seen that this condition is sufficient for all three jurists to render the gift a valid contract.

36.2.6 Object of gift must be separate

The Hanafis ruled that the gift is not valid if its object is physically or contractually connected to another in an inseparable manner. This ruling follows from the gift receipt requirement, which is not possible if such connections exist.¹⁴ For instance, if a person owns agricultural land in which a crop is growing, then it is not permissible for him to give the land alone or the crop alone as a gift. Even if the donee of such a gift were to receive it, the contract would still be considered defective due to the donor's ownership of the connected component. However, if the two are separated (e.g. the land was given as a gift, and the owner removed the crop and delivered the land by itself), then the contract becomes valid since the ownership that prevented execution of the contract is thus removed.

There are many other similar cases, e.g. give a house as a gift while maintaining ownership of furniture therein, giving trees as a gift to the exclusion of fruits growing thereupon, etc. In all such cases, the donor's ownership is not transferred to the donee. This ruling follows from the consideration of a gift of part of a connected whole as an instance of effecting common property through a gift, which renders the contract defective. In all those examples, separation of the gift component was possible, and thus giving the partial gift was not permitted.¹⁵ Then, if the two components are separated, the contract becomes permissible.

Unborn animals

Based on the previous discussion, jurists may rule by analogy that giving a pregnant animal as a gift, but retaining ownership of her unborn offspring, is impermissible. However, they ruled based on juristic approbation that if such a gift is given, the donee is considered the owner of both the mother and her offspring, thus invalidating the stipulated exception. In general, we can divide the class of contracts with similar conditions into three categories:¹⁶

1. For sales, leases and worker hires, and pawning, including such an exception would render the contract defective.¹⁷ Thus, if the pregnant mother is an object of any of those three contracts, and the unborn offspring is excluded, the exclusion is considered an invalid condition, and the contract

¹⁴ Al-Sarakhsī (1st edition (Hanafi), vol.12, p.73), 'Ibn Al-Humām ((Hanafi), vol.7, pp.124,127), Al-Kāsānī ((Hanafi), vol.6, p.125), 'Ibn 'Abidīn ((Hanafi), vol.4, p.533 onwards), *Majma' Al-Damānāt* (p.336).

¹⁵ *Al-Farā'id Al-Bahiyya fī Al-Qawā'id Al-Fiqhiyya* by Shaykh Mahmūd Ḥamza (p.204).

¹⁶ Al-Sarakhsī (1st edition (Hanafi), vol.12, p72; vol.13, p.19), 'Ibn Al-Humām ((Hanafi), vol.7, p.139 onwards), Al-Kāsānī ((Hanafi), vol.6, p.125), 'Ibn 'Abidīn ((Hanafi), vol.4, p.113), *Majma' Al-Damānāt* (p.337), *Al-Farā'id Al-Bahiyya fī Al-Qawā'id Al-Fiqhiyya* by Shaykh Mahmūd Ḥamza (p.206).

¹⁷ In this classification, we are following the view stipulated in Al-Kāsānī ((Hanafi)) that a defective condition renders a pawning contract defective, in analogy to sales. However, the more correct view is that expressed in *Al-Ziyādāt*, which classifies pawning with gifts as voluntary non-commutative contracts for which a defective condition is invalidated, but does not affect the contract itself.

is rendered defective. In this regard, the unborn animal in the womb is derivative of its mother, and excluding it from the contract is a violation of the contract, thus rendering it defective. This ruling is predicated on the general rule that commutative financial contracts that contain a defective condition are rendered defective.¹⁸

2. In marriage, divorce in exchange for a financial compensation (*khul'*), forgiveness of a killer, and gifts, the contract containing such an exclusion condition would be rendered valid, and the exclusion condition is invalidated. In all such contracts, the effect of the contract is not affected by the exclusion condition, which is rendered defective. The general rule from which this ruling is derived is the nugatory and invalid nature of defective conditions in voluntary non-commutative contracts, and the maintained validity of the contract itself. In the case of gifts, this rule is predicated upon the Prophet's (pbuh) permission of temporal gifts as general gifts, with the temporal restriction being validated.¹⁹ In this regard, gifts are different from sales, where the Prophet (pbuh) forbade having a sale and a condition in one contract.²⁰
3. Only in the bequest contract would the contract and the exclusion both be permissible. Thus, if a man bequeaths a pregnant mare to another, but excludes her offspring from the bequest, then the offspring would belong to his heirs, while the mare itself would belong to the recipient of the bequest. This contract is special since the transfer of property in bequest contracts is necessarily postponed to the future until the time of death. Thus, the establishment of ownership is postponed until such a time, allowing for the exclusion condition to take effect.

36.2.7 Gift receipt

This is perhaps the most important condition for the gift contract, and we have left it towards the end to allow us to discuss its many consequences. Its importance stems from the fact that ownership of the gift object is not transferred except through receipt. Thus, a gift is in fact effected through receipt. Jurists differed over the nature of this condition, whereby some of the Ḥanafīs and the Hanbālī jurist 'Ibn 'Aqīl considered it a cornerstone, while many considered it

¹⁸ *Al-'Amwāl wa Nazariyyat Al-'Aqd* by Dr. Muhammad Yūsuf Mūsā (p. 423).

¹⁹ibid. This is based on the Ḥadīth discussed above on the authority of Jābir. In fact, some of the narrations in 'Abū Dāwūd, Al-Nasā'ī, and Al-Tirmidhī (who rendered it a valid Ḥadīth), the text of the Ḥadīth states: "If a man gives a gift and specifies that it is temporally restricted to the life of the donee and his offspring, then ownership of the item is transferred to the donee, since the donor has thus made a property transfer that follows the inheritance rules". Al-Nasā'ī also narrated a similar Ḥadīth on the authority of 'Abdullāh ibn Al-Zubayr.

²⁰Narrated by Al-Ṭabarānī in his *Al-mu'jam Al-Wasat* on the authority of 'Amr ibn Shu'ayb on the authority of his father and grandfather thus: "The Prophet(pbuH) forbade having a sale and a condition in one contract, thus ruling that the sale is invalid and the condition is invalid", c.f. Al-Ḥāfiẓ Al-Zayla'ī (1st edition, (Ḥadīth), vol.4, p.17).

a condition of conclusion and bindingness, but not a condition of validity. In what follows, we shall discuss the nature of the receipt condition in some detail:

- The Ḥanafis and Shāfi‘īs ruled that receipt is a bindingness condition for the gift contract, since new ownership is not established without such receipt.²¹ They provide proof for this position based on the narration by ‘Ā’isha (mAbpwh) that her father gave her a gift out of his property during his lifetime. Then, while on his death bed, he said: “O daughter, after myself, you are my most beloved person, and you are the person whose poverty I am most intent on avoiding. Now, I gave you a gift out of my property, and had you already collected the gift, then it is yours. However, this property today belongs to all of my heirs, including your two brothers and two sisters. Therefore, divide the property according to the rules of inheritance detailed in the Book of Allāh...”²²

This text establishes that a gift becomes binding upon receipt, and not before. Another proof is provided by the tradition that ‘Umar (mAbpwh) said: “I wonder why some men give gifts to their children, but keep them in their possession. Then if their child were to die, he would say: ‘my property is in my possession, and I have not given it to anyone’. But, then if he himself is about to die, he says ‘this property belongs to my son, for I have given it to him as a gift’. This practice is not allowed. Thus, if a person gives a gift but the gift is not received by the intended party, intending that they will only get it if he dies, then the gift is invalid”.²³ There are similar traditions on the authority of ‘Uthmān and ‘Ali (mAbpwt).²⁴ Thus, we have seen that the four Guided Khalifs and other major companions of the Prophet (pbuh) have agreed that gifts are not effected except through receipt.²⁵

²¹Ibn ‘Ābidīn ((Hanafi), vol.4, p.533; vol.5, p.341), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.400).

²²This *Hadīth* was narrated by Mālik in *Al-Muwatta* on the authority of ‘Ā’isha (mAbpwh), and narrated later by Muḥammad ibn Al-Ḥasan, ‘Abdul-Razzāq, and Al-Bayhaqī, c.f. ‘Ibn Al-‘Athīr Al-Jazarī (, vol.212, p.269), Al-Suyūtī (b, vol.2, p.223), Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.122), ‘Ibn Ḥajar (, p.260), Al-Shawkānī (, vol.5, p.349).

²³Al-Suyūtī (b, ibid.).

²⁴In this regard, charity given to a poor person is similar to gifts, in the sense that the contract is not effected except through receipt. Also, in analogy to the voluntary uncompensated gift contract, it is not valid for a share in divisible common property. On the other hand, if a divisible property is given as a gift to two poor people, then the contract is valid since the charity’s recipient is in fact Allāh (swt) and not the two poor individuals. Another difference between charities and gifts, based on juristic approbation, is the invalidity of rescinding charity after it is received, even if the recipient were rich. This ruling follows from the fact that charities are given with the intention of gaining divine rewards, which are given at the time of the charity.

²⁵Those traditions are related to the actions of the Prophet’s (pbuh) companions. Al-Zayla‘ī disagreed with those who treated such traditions as *Hadīths*. On narration of this general principle is given in ‘Abdul-Razzāq’s narration on the authority of Al-Nakhī thus: “The gift is not permissible as a contract until its receipt, but charities are permissible as a contract even before receipt”, c.f. Al-Ḥāfiẓ Al-Zayla‘ī (1st edition, (Hadīth), vol.4, p.121), Al-Sarakhsī (1st edition (Hanafi), vol.12, p.57), ‘Ibn Al-Humām ((Hanafi), vol.7, p.113 onwards), Al-Kāsānī ((Hanafi), vol.6, p.123), ‘Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.447), Al-Khaṭīb

- In this regard, there are two reported opinions for 'Imām 'Ahmad. The one favored by the Ḥanbalīs is the view that receipt is a validity condition for goods measured by weight and volume. This opinion was based on the consensus of the Prophet's (pbuh) companions. The Ḥanbalīs language suggests that classifying receipt as a validity condition means that it is in fact a bindingness condition. This can be inferred from the statement by 'Ibn Qudāmah: "Most of the jurists agree that gifts and charities in goods measurable by weight and volume do not become binding except through receipt". On the other hand, for items not measured by weight or volume, they ruled that the gift becomes binding immediately following the conclusion of the contract. In such cases, ownership of the gift is established prior to receipt, based on the narration that ^cAlī and 'Ibn Mas'ūd (mAbpwt) said: "A gift contract is permissible if the gift is known, whether or not it is actually received".²⁶
- The Mālikīs ruled that receipt is neither a validity condition, nor a bindingness condition. They ruled that receipt is in fact a condition for the full effects of the contract to be achieved. Thus, the most common opinion in the Mālikīs school renders the gift object owned by the donee immediately following the conclusion of the contract. Thus, the donor is obliged to deliver the object to the donee, so that the contract's effects can be achieved through receipt. Their ruling is based on analogy of the gift contract to sales and other contracts that result in ownership transfer. They also used the above referenced narration on behalf of ^cAlī and 'Ibn Mas'ūd (mAbpwt).²⁷
- In summary, the Mālikīs ruled that the object of a gift is owned by the stated donee based on the contract, while the other jurists ruled that ownership is only established through receipt (and not through the contract alone).²⁸

36.2.8 Donor's permission

The majority of non-Ḥanafī jurists ruled that receipt of the object of a gift is not valid if effected without the donor's permission. Thus, if the donee gains possession of the object without the donor's permission, he is not considered its owner, and he must guarantee it for the owner. In such cases, delivery of the gift is not a liability on the donor, and thus may not be effected without his permission. Moreover, consent of the seller is a permission of validity in sales,

Al-Shirbīnī ((Shāfi'i), vol.2, p.400).

²⁶'Ibn Qudāmah (, vol.5, p.591 onwards).

²⁷'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.324), *Hāshiyat Al-Dusūqī* (vol.4, p.101).

²⁸The latter view is based on the narration in Al-Ḥākim's *Sahīh* that the Prophet (pbuh) "gave thirty ounces of musk as a gift to Al-Najāshī, and then told 'Umm Salamah: 'I learned that Al-Najāshī died, and expect that the gift I sent him will be returned. If it is returned, then it is yours'." In this regard, the gift contract is a voluntary uncompensated contract similar to loans, and in both cases ownership is only established through receipt.

and such a requirement is more appropriate in the gift contract, which is special due to stipulating receipt itself as a condition of contract validity.²⁹

The Ḥanafis agreed that the ruling according to reasoning by analogy would make receipt valid only if effected with the donor's permission, either at the contract session or after parting. This ruling is based on the view that receipt amounts to dealing in the donor's property without his permission, which is not valid. However, they ruled based on juristic approbation that receipt without the donor's permission is permissible during the contract session. This ruling is based on the view that receipt of a gift is a form of acceptance of the donor's offer. Thus, the offer can be viewed as an implicit permission from the donor for collecting the gift. This permission, however, is restricted to the contract session during which such an implicit permission is established immediately following the offer. Thus, during the contract session, acceptance and all actions associated with it (including receipt) are rendered permissible. However, if the two parties part without receipt, then receiving the gift later is separate from acceptance of the gift, and thus it requires the permission of the donor.

An example can illustrate those two means of inference in the Ḥanafi school. If a person gives a gift to another, without giving his explicit permission to the donee to collect the gift, then their ruling based on juristic approbation indicates that receipt during the contract session is still permitted. However, the ruling by analogy remains in effect for receipt after the contract session, whereby receipt is not permitted without the explicit permission of the donor. Zufar supported this opinion based on his view that receipt is a cornerstone of the gift contract, since it is the essence of acceptance of a gift, without which the legal status of the contract cannot be established positively. Thus, he ruled that receipt after parting from the contract session is not permitted, since acceptance after parting from the contract session is not.

In contrast, the Mālikīs ruled that receipt without the donor's permission is valid at all times. In the view of most jurists in their school, ownership of the gift object is established by the mere offer. Thus, the offer donee may collect his property at any time, and if necessary, the donor may be forced to allow the donee to collect the gift.³⁰

Third-party debts as gifts

If a person gives another a debt owed to him by another as a gift, then an explicit permission to collect the debt must be issued. In contrast to other gifts owned by the donor, implicit permissions is not sufficient for the gift of debts. In normal gifts, the offer is an implicit permission to the donee to collect the object and establish his ownership. In contrast, the right to assume ownership of a debt requires an explicit statement to this effect, which is in fact a permission to collect the debt. In the latter case, the donee is deemed first to collect the debt on behalf of the donor, thus establishing it as property of the donor. Then,

²⁹ Al-Kāsānī ((Ḥanafī), vol.6, p.123), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.115), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.400), 'Ibn Qudāmah (, vol.5, p.592).

³⁰ *Hāshiyat Al-Dusūqī* (vol.4, p.101).

he is deemed to implicitly receive it from the donor and take it into his own property.

The permissibility of giving such a debt as a gift to a third party was established based on juristic approbation. However, Zufar maintained the ruling based on reasoning by analogy, which renders such gifts impermissible. This reasoning by analogy is based on the fact that Ḥanafīs do not consider credits with others as property (they ruled that one can swear correctly that he is penniless, even though others may owe him money). Thus, this ruling is based on the view that a gift contract is permitted to transfer property, and thus the object of a gift must be property owned by the donor.³¹

The Ḥanafīs and Shāfiʻīs add more conditions for the validity of gift receipts:

1. The Ḥanafīs require the gift recipient to be sane, and the Shāfiʻīs require such a recipient to be sane and of legal age. Those conditions follow from the legal view that receipt of property is a form of guardianship with respect to the property, thus inheriting its conditions.
2. The Ḥanafīs and Shāfiʻīs also require that the object of gift contract must not be physically connected to other objects in a manner that prevents receipt of the gift.
3. The Ḥanafīs also required that the gift not be legally connected to other objects (e.g. as an unidentified share in common property), since that would prevent receipt of the gift.

36.3 Two types of receipt

The Ḥanafīs distinguished in their rulings between two types of gift receipt, depending on whether the receipt is made by the donee himself, or on behalf of one.³²

36.3.1 Receipt on behalf of oneself

In the case of receipt on behalf of oneself, the only condition they stipulated was sanity and discernment. Thus, they exclude undiscerning children and insane individuals from receiving gifts. On the other hand, they ruled by juristic approbation that being of legal age is not necessary provided that the child is discerning. They ruled thus based on the fact that receiving gift is a purely beneficial contract, and hence may be effected by a discerning child. This is in contrast to the non-Ḥanafī ruling analogy, which would require legal age to be consistent with the legal guardianship conditions in sales and other contracts.

³¹ Al-Sarakhsī (1st edition (Ḥanafī), vol.12, p.70), Al-Kāṣānī ((Ḥanafī), vol.5, pp.119,124), 'Ibn ʻĀbidīn ((Ḥanafī), vol.5, p.544).

³² Al-Kāṣānī ((Ḥanafī), vol.5, p.126 onwards), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.125 onwards), 'Ibn ʻĀbidīn ((Ḥanafī), vol.4, p.535), ʻAbd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.173).

36.3.2 Receipt on behalf of another

There are two types of receipts of gifts on behalf of another. One type pertains to the representation (*niyābah*) of the recipient, and another pertains to the representation of the act of receipt.

Representation of the recipient

This type of representation is required for young children, who do not have the legal right to take receipt on their own. The recipient on behalf of such a young child must be the legal guardian of that child. In this regard, the Ḥanafīs give the following prioritized list of potential legal guardians to receive gifts on behalf of a young child: the father, then a legal guardian commissioned by the father, then the grandfather, then a legal guardian commissioned by him, etc. In the absence of the closest direct legal guardians, the list progresses to further relatives, instead of postponing receipt of the gift and possibly depriving the young child from a benefit he could have received. If any of the four stated guardians are present, it is not permissible for any other party to receive on behalf of the child (including brothers, mothers, or uncles), since those other parties would not have the right to deal in the child's property. However, if none of the four were present, then juristic approbation dictates that whoever is taking care of the child may receive the gift on his behalf, to ensure that the child does not lose this pure benefit. This is in contrast to the ruling by analogy, which will dictate that such receipt is impermissible since those parties do not have legal guardianship over the child.

As a consequence of this ruling, if one of the eligible legal guardians gives a gift to the young child, and keeps it in his own possession, the gift is valid, and they are considered recipients on behalf of the child. Also, if a man sells something to his young son, and the goods perished after the conclusion of the sale, they perish in the property of the child, since the father's possession constitutes receipt by the child.

As we have seen previously, juristic approbation dictates that a discerning child may receive gifts given to him by one of the four categories of guardians enumerated above. This is in contrast to the ruling by analogy, which is the same in this situation as the previously discussed ruling for receiving gifts on behalf of oneself.

Representation of the act of receipt

The second type of representation in receipt is effected when the actual receipt is effected through another type of receipt, which may be stronger or weaker. In what follows, we discuss specific examples of such representation:

1. The gift object may be in the possession of the gift recipient as a loan or deposit. In this case, juristic approbation dictates that if the object is given as a gift, there is need to have a separate receipt to effect the gift. This ruling is based on the view that receipt of loaned or deposited items

are just as strong as receipt of a gift. In this regard, all three contracts are voluntary uncompensated contracts in which the holder of the item does not guarantee it. Thus, the two types of receipt were sufficiently similar for one type to represent the other.

However, reasoning by analogy dictates that the possessor of the gift is not in receipt of the item as a gift unless receipt is renewed, by returning the item to the donor and then receiving it again. This ruling is based on the view that the first possession is only a possession in form, but the depositor remains the true possessor of the good, until a new delivery is effected to establish gift receipt.

2. The object of the gift may be held by the donee with guarantee, e.g. if it is usurped, if it was received in a defective sale, or if it is being held for inspection to determine whether or not to purchase the item at an agreed-upon price.³³ In such cases, the gift is valid, and the holder of the item is absolved of his guarantee of the object. In those cases, the existing receipt with guarantee is stronger than trust receipts, and thus it can replace the weaker receipt required by the gift contract.
3. The object of the gift contract may be already in the possession of the donee, while being guaranteed by something else. Examples of this type of possession are pawned objects that are guaranteed by a debt, or a sold object that is guaranteed by the price. In those cases, Al-Karkhi ruled that if the object is given as a gift, receipt must be renewed to effect receipt of the gift. This ruling follows from the fact that the possessor in those cases cannot be absolved from the guarantee, and hence the existing possession may not be turned into a trust receipt. Thus, neither receipt can be established as stronger than the other, requiring renewing the receipt to effect the transfer of ownership.

However, the better opinion was specified in *Al-Jāmi'* *Al-Saghīr* and *Al-Badā'i'*. According to this opinion, the gift in those cases is considered to be in receipt. This ruling is based on the view that a possession with any type of guarantee is stronger than any type of trust receipt. Thus, the existing receipt is sufficient for the transfer of ownership under the gift contract.

³³The last case involves guaranteeing the value of the goods held while deciding whether or not to buy them at a specified price. This must be distinguished from the case where the item is simply held to inspect the item without having discussed the price. In the latter case, the items are not guaranteed. See, e.g. *Majma'* *Al-Damānāt* (pp.213,217), 'Ibn 'Abidīn ((Hanafi), vol.4, p.52), *Hāshiyat Al-Sharqāwī* (vol.2, p.150), *'Aqd Al-Bay'* for Professor Al-Zarqā' (p.96).

Chapter 37

Legal Status of Gifts

The general legal effect of a gift contract is the establishment of donee ownership of the gift object, without any compensation to the donor. The characterization of this general status of the contract varies across schools of jurisprudence, as detailed below:

- The Ḥanafīs ruled that the establishment of ownership for the donee is not binding, thus permitting recalling the gift and voiding the contract. This ruling is based on the *Hadīth*: “The donor is more worthy of his gift as long as he received no compensation for it”.¹ This Text clearly implies that the donor is allowed to recall the gift, even after its receipt, provided that he had not received compensation for it. Of course, recalling gifts is still considered to be “lowness” (*danā’ah*), and the donee has the right to refuse to return the gift. Thus, returning the gift may only be effected through mutual consent, or by a judge’s order. This follows from the fact that returning a gift is a voiding of the gift contract after its conclusion. In this regard, it is analogous to voiding a sales contract after receipt, based on a defect.² Hence, returning a gift with mutual consent is considered a revocation contract.
- As we have already seen, the Mālikīs ruled that ownership of the gift object is established through the contract. Moreover, they ruled that the contract becomes binding through receipt, and thus it is generally not permissible for the donor to rescind the gift. The only exception to this rule is the case whereby a father may give a gift to his son, and then rescind the gift provided that this does not affect the rights of a third

¹Narrated by ’Ibn Mājah and Al-Dāraqutnī on the authority of ’Abū Hurayrah with a weak link in its chain of narration. It was also narrated by Al-Ṭabarānī in his *Mu’jam* and by Al-Dāraqutnī in his *Sunan*, both on the authority of ’Ibn ‘Abbās. A third narration was validated by Al-Ḥākim, Al-Bayhaqī, and ’Ibn Hazm on the authority of ’Ibn ‘Umar, c.f. Al-Ḥāfiẓ Al-Zayla’ī (1st edition, (*Hadīth*), vol.4, p.125), ’Ibn Ḥajar (, p.260 onwards), Al-Ṣan‘ānī (2nd printing, vol.3, p.93).

²Al-Ķasānī ((Ḥanafī), vol.6, p.127), ’Ibn Al-Humām ((Ḥanafī), vol.7, p.129), *Majma’ Al-Damānāt* (p.338).

party (e.g. through marriage or a new debt).³ In what follows, we list the five conditions stipulated by the Mālikīs to permit a father to rescind a gift he previously gave to his son (provided it was not charity given for religious reasons):

- The son must not have married after the gift was given.
- The son must not have initiated a deferred debt in the meantime.
- The object of the gift must have remained unchanged.
- The donee must not have affected the gift.
- Neither the donor nor the donee should have fallen sick.

If any of those five conditions is violated, then the gift may not be rescinded.

On the other hand, any gift given as charity seeking the pleasure of Allāh (swt) can never be rescinded. In such cases, if the donor wants to get the object back, he would have to buy it back. In the meantime, he may not use the item (e.g. eating the fruits of trees given in charity, or riding an animal given in charity).

Note that the Mālikīs permit giving gifts with a stipulated condition that the donee must give the donor a compensation. In such cases, the donee has the right to accept or reject it. If he accepts the gift, he is required to compensate the donor with the value of his gift. In this case, the donee is not required to pay more than the gift's value, and the donor is not required to accept any less than the gift's value (and may thus rescind the offer if he does not receive the appropriate compensation).

- The Shāfi‘īs and Ḥanbalīs also ruled that a donor is generally disallowed from rescinding the gift, with the exception of a father rescinding a gift he gave to his child. The general restriction against rescinding gifts is based on the *Hadīth*: “The one who rescinds his gift is like a dog who eats his vomit”.⁴

Both the general rule as well as the exception are established by the *Hadīth*: “Nobody is allowed to give a gift and then rescind it, except for the father's right to rescind gifts given to his child”.⁵ The Shāfi‘īs extended this

³ *Hāshiyat Al-Dusūqī* (vol.4, p.110), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, pp.324,327), Al-Bājī Al-'Andalusi (1st edition (Mālikī), vol.6, pp.113,116), 'Ibn Juzayy ((Mālikī), p.367).

⁴ The various narrations of this *Hadīth* were discussed above, c.f. Al-Ṣan‘ānī (2nd printing, vol.3, p.90).

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permission from the father to all of the child's paternal lineage.⁶

- In summary, the Ḥanafīs render the legal status of the gift contract non-binding, while the other jurists consider it binding except for a father giving a gift to his child. In the latter case, the Mālikīs permit rescinding the gift before receipt only, while the Shāfi'īs and Ḥanbalīs permit rescinding it before or after receipt. The Shāfi'īs also extended this exception to grandfathers, great grandfathers, etc.

⁶Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī)), vol.2, p.401), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī)), vol.1, p.447), 'Ibn Qudāmah (, vol.5, p.621).

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permission from the father to all of the child's paternal lineage.⁶

- In summary, the Ḥanafīs render the legal status of the gift contract non-binding, while the other jurists consider it binding except for a father giving a gift to his child. In the latter case, the Mālikīs permit rescinding the gift before receipt only, while the Shāfi'īs and Ḥanbalīs permit rescinding it before or after receipt. The Shāfi'īs also extended this exception to grandfathers, great grandfathers, etc.

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Chapter 38

Prevention of Gift Rescinding

There are seven factors that prevent the donor from rescinding his gift: (i) if the gift was compensated materially, (ii) if the compensation was not material (e.g. in charities), (iii) if an increase ensued in the gift object, (iv) if the gift is no longer owned by the recipient, (v) if either party died, (vi) if the gift object was consumed or if it perished, and (vii) if the gift recipient married. The seventh factor is obvious, and we have discussed it previously under Mālikī rules for a father rescinding a gift he gave to his son. In the remainder of this chapter, we discuss the first six factors in some degree of detail.

38.1 Material compensation

If the donor received a material compensation from the donee, then he is prevented from rescinding his gift. This ruling follows from the Prophet's (pbuh) *Hadīth*: "The donor is more worthy of keeping his property, as long as he was not compensated for it". In this case, receiving a compensation is proof that it was the reason he gave the gift. On the other hand, if the donee never indicated that he had given something as a compensation for the gift, then the donor may rescind it.

We need to distinguish between two cases, depending on whether or not the compensation was stipulated as a condition in the contract:¹

1. The major scholars of all four schools of jurisprudence ruled that a gift contract containing a condition of compensation (e.g. "I give you this pen as a gift, but you have to give me this T-shirt as a gift in compensation") is valid, and that the condition itself is also valid. On the other hand,

¹Al-Sarakhsī (1st edition (Hanafi), vol.12, p.75 onwards), Al-Kāṣānī ((Hanafi), vol.6, p.130), 'Ibn Al-Humām ((Hanafi), vol.7, p.133), 'Ibn 'Abidīn ((Hanafi), vol.4, p.539).

they differed over their characterization of that valid contract, as detailed below:

- With the exception of Zufar, the Ḥanafīs ruled that the contract is considered a gift initially, but a sale at the end. Thus, the legal rulings for gift contracts apply prior to receipt (e.g. it cannot be effected for unidentified shares in common property, receipt is required, etc.). Thus, both the gift and its compensation may be kept prior to the exchange. However, following the exchange, the contract is considered a sale, and thus returning them to their owners must be effected only in cases where the items were not inspected and a defect was found. In such cases, the contract can be revoked in most cases, but preemption (*shuf^cah*) is required if one of the compensations was real estate.

On the other hand, Zufar rendered this contract a sale from beginning to end. Thus, it is subject to all the conditions of sales, including the fact that it is not rendered defective if it contains a component of common ownership. Moreover, conclusion of the contract thus establishes ownership of the compensations even before receipt. Thus, he viewed the contract primarily as one of exchanging one property for another, which is a sale. However, the majority of Ḥanafīs continued to view the contract as a hybrid, since it contained the contract language of a gift, and the essence of a sale. Thus, they ruled that the contract would inherit some properties from each of those contracts.²

- The Mālikīs ruled that this contract would be considered a sale in most circumstances, but occasionally considered a gift. The occasional differentiation between this contract and sales is the permissibility of giving a gift with an unknown compensation, or compensation with an unknown deferment period. In the first case, the donor must accept the compensation and he would not be allowed to return the compensation based on finding a defect. The only exceptions where returning a defective compensation is allowed are cases with extremely harmful defects (e.g. infectious disease in an animal), in which case the donor is not required to accept it as compensation, even if the other party pays him the difference in value.³
- Most of the Shāfi‘īs and Ḥanbalīs ruled that the contract is considered a sale. Thus, the donee is required to pay the stipulated compensation, and all the rules of sales apply (e.g. preemption, options, guaranty of rights associated with sold properties, etc.).⁴ Their ruling was based on the view that the condition of compensation is

²Al-Kāṣānī ((Hanafi), vol.6, p.132).

³Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.326), *Hāshiyat Al-Dusūqī* (vol.4, p.114), 'Ibn Juzayy ((Mālikī), p.352).

⁴Abū-'Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.447), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.404), *Aqd Al-Bay^c* for Professor Al-Zarqā' (p.97).

not in accordance with the nature of gifts. Thus, the gift contract is rendered defective, and the contract must be validated as a sale.

2. The recipient of a gift may voluntarily give the donor a compensation later. We must then consider two cases, depending on whether or not the recipient of the first gift specifies his later action as compensation for the first gift:

- If he does not explicitly state that this is a compensation for the earlier gift, then he is considered to be giving a separate gift. In this case, either gift, or both, may be rescinded.
- If the recipient of the first gift explicitly said that what he is giving is a compensation for that gift, then jurists still view it as a separate gift, but the ruling for the first gift is now different. In this case, the first gift is considered to be compensated, and thus the first donor is prevented from rescinding it.⁵

Compensating a donor

Jurists differed in opinion over whether or not the recipient of an unconditional gift must still compensate it voluntarily:

- The Ḥanafīs, Ḥanbalīs, and most of the Shāfi‘īs ruled that the recipient of an unconditional gift is not required to compensate it, regardless of whether he is richer or poorer than the donor.⁶
- On the other hand, the Mālikīs ruled that the gift recipient should compensate the donor if there is any indication that the donor may be expecting a compensation. They ruled that this was particularly important in the case where a poor person gives a gift to a rich one, which very often indicates that he is expecting compensation. A proof of this opinion is based on ‘Umar’s (mAbpwh) statement: “If a person gives a gift seeking compensation, then he may rescind it, unless he receives a compensation that meets his expectations”.⁷

38.2 Non-material compensation

There are three types of non-material compensations that a donor may receive:⁸

⁵ Al-Kāsānī ((Ḥanafī), vol.6, p.131), Al-Sarakhsī (1st edition (Ḥanafī), vol.12, pp.76,82).

⁶ Al-Kāsānī ((Ḥanafī), vol.6, p.132), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.447), Al-Khatīb Al-Shirbīni ((Shāfi‘ī), vol.2, p.404), ’Ibn Qudāmah (, vol.5, p.623).

⁷ ’Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.326), ḥāshiyat Al-Dusūqī (vol.4, p.114), Al-Bājī Al-’Andalusī (1st edition (Mālikī), vol.6, p.111).

⁸ Al-Kāsānī ((Ḥanafī), vol.6, p.132), ’Ibn Al-Humām ((Ḥanafī), vol.7, p.134), ’Ibn ʻĀbidīn ((Ḥanafī), vol.4, p.541).

1. The donor may receive reward from Allāh (swt). Thus, a gift to a poor person is considered charity seeking the pleasure of Allāh (swt), and rewards from Him. In this case, the gift or charity donor is not allowed to rescind it.
2. The donor may receive a moral and social reward by giving gifts to immediate family members. Such rewards are more significant than financial ones, and they can also translate into rewards from Allāh (swt) for obeying the command of kindness to one's kinfolk. Thus, gifts to immediate family members may not be rescinded.
3. Spousal relations are considered to be as strong as ties to immediate family members, and hence gifts to spouses may not be rescinded.

38.3 Growth in the gift

If the object of the gift incurs some attached growth (e.g. planting trees in land, building extensions to houses, the animal grows in size, etc.), then the gift may not be rescinded. This applies whether or not the growth was effected by the donee, and whether or not it was derivative of the gift object. The impermissibility of rescinding the gift in this case follows from the fact that returning the gift object would require returning the attached growth, which is not part of the gift.

On the other hand, if the growth were disconnected, then the gift may be rescinded. This applies whether or not the growth was derivative of the gift itself. In all such cases, the initial gift contract may be voided, and the object would thus be returned without the increase. This is in contrast to the ruling in sales, where the disconnected increase would still prevent returning the sold item based on finding a defect, to avoid the possibility of effecting *ribā*. In the case of a sale, the buyer would keep the increase, thus effecting the essence of *ribā*. However, there is no danger of *ribā* in the gift contract, since it is not a commutative contract.

In contrast to increases, reductions in the gift object do not prevent rescinding the gift. The donor's right to recall the remaining part of the gift follows immediately from his right to recall the entire gift had it remained intact. In this case, the donee does not guarantee the object or compensate the donor for the reduction in its object, since the gift receipt is not a guaranteed receipt.⁹

38.4 Transfer of property

If ownership of the gift object was transferred to another (e.g. through a sale, or a gift, etc.), the donor of the first gift is prevented from rescinding it. In this case, the donor caused the gift recipient's ownership of the object, but once

⁹Al-Sarakhsī (1st edition (Hanafi), vol.12, pp.83,88), Al-Kāsānī ((Hanafi), vol.6, p.129), 'Ibn Al-Humām ((Hanafi), vol.7, p.132), 'Ibn 'Abidin ((Hanafi), vol.4, p.538).

the ownership is changed, he has no right to void it. This is in analogy to the impermissibility of giving one item as a gift, and then recalling another item. In this case, the change of item prevents recalling the object, and similarly, the change of ownership prevents recalling the gift.¹⁰

38.5 Death of either party

If the recipient of a gift dies, ownership of the gift is transferred to his heirs. Thus, as we have seen, this change in ownership will prevent the donor from rescinding his gift. Similarly, death of the donor would transfer all of his properties to his heirs, who did not initiate the first gift contract, and thus they cannot rescind it.¹¹

38.6 If the gift perishes

If the gift object were to perish or if it was consumed, then returning it to the donor becomes impossible. Therefore, recalling the object of the gift is prevented. Moreover, the donor may not ask the donee to return the value of the gift, since that is not what was given as a gift. In this regard, we have already seen that gift receipt is not a receipt of guarantee.¹²

38.7 Characterization of gift returns

All jurists agreed that if a gift is returned by court order, the return is considered an annulment of the gift contract. However, they differed in their characterization of gift returns by mutual agreement:

- Zufar ruled that such returns are new gifts. In this case, the donee would be giving his newly acquired property to the donor, with mutual consent. This makes the return similar to returning defective items in a sale, thus rendering it a new contract in which a third party is involved
- The majority of Ḥanafis ruled that such returns are also considered an annulment of the gift contract. Thus, such returns are permissible for shares in common properties, and receipt is not a condition for conclusion of the return.

In contrast to Zufar's opinion, the majority of Ḥanafis ruled that the donor is collecting his own right by recalling it, and collecting one's own right does not require the intervention of a third party (e.g. a judge). This distinguishes the gift return from court-ordered returns of defective

¹⁰ Al-Kāsānī ((Hanafi), vol.6, p.128), 'Ibn āAbidīn ((Hanafi), vol.4, p.541), 'Ibn Al-Humām ((Hanafi), ibid.), Al-Sarakhsī (1st edition (Hanafi), vol.12, p.84).

¹¹ 'Ibn Al-Humām ((Hanafi), ibid.), 'Ibn āAbidīn ((Hanafi), vol.4, p.539).

¹² Al-Kāsānī ((Hanafi), vol.6, p.128), 'Ibn āAbidīn ((Hanafi), vol.4, p.542).

items after receipt. It is in the latter case that the return must be viewed as a new contract involving a third party, since the buyer in that case only has the right to receive merchandise that is free of defects, but does not have the right to annul the contract. However, they ruled that those considerations are not applicable to gift returns by mutual consent.¹³

¹³ Al-Kāsānī ((Hanafi), vol.6, p.134).

Chapter 39

Gifts to Immediate Family

39.1 Gifts to offspring

The majority of jurists ruled that equality among children in gift-giving is recommended, and thus viewed unequal treatment in such practice as reprehensible. On the other hand, they had varying explanations of the nature of this recommendation of equal treatment in gift-giving:

- The Ḥanafi jurist 'Abū Yūsuf, the Mālikīs, and Shāfi'īs shared the majority opinion that equality should be effected in gift-giving for all children, be they male or female. This ruling, that female offspring should be given equal gifts to male offspring, is based on the *Hadīth*: "When giving gifts, give all your children equal amounts. In fact, if I were to give unequal amounts, I would give more to the women".¹ This *Hadīth* was narrated by Sa'īd ibn Manṣūr in his *Sunan*, and also by Al-Bayhaqī, with a good chain of narrators. A version of this *Hadīth* in Al-Bukhārī was narrated thus: "Be wary of Allāh, and be fair to your children".² In addition to this Text, which they interpreted as a recommendation (*nadb*) of fairness, such fairness in dealing with people and distributing one's wealth among one's children is clearly a desirable practice.³

¹Narrated by Al-Tabarānī in *Al-'Awsat* on the authority of 'Ibn 'Abbās. However, this chain of narration contains Sa'īd ibn Yūsuf, whose narrations are considered weak. As a matter of fact, 'Ibn 'Udayy said in *Al-Kāmil* that of all his narrations, this one was the most questionable, c.f. 'Ibn Hajar (, p.260), Al-Haythamī (, vol.4,p.153).

²Narrated by Al-Bukhārī, Muslim, 'Abū Dāwūd, Al-Tirmidhī, Al-Nasā'ī, and Mālik in *Al-Muwatta'* on the authority of Al-Nu'mān ibn Bashīr that he said: "My father gave me some of his wealth as a charity, but my mother said that she will not agree to this gift unless you let the Prophet (pbuh) witnesses it. So, my father went to the Prophet (pbuh) to make him witness his charity. The Prophet (pbuh) asked him: 'Did you give the same to all of your children?', and my father said no. Then the Prophet (pbuh) said: 'Have wariness of Allāh and observe fairness with your children'. Then, my father returned and took back the charity". There are other narrations as well, c.f. 'Ibn Al-'Athīr Al-Jazarī (, vol.12, p.266), 'Ibn Hajar (, p.260), Al-Ṣan'ānī (2nd printing, vol.3, p.89).

³Al-Samarqandī ((Hanafi), vol.3, p.274), Al-Shāfi'īrānī ((Shāfi'ī), vol.2, p.100), 'Abū-'Ishāq

- It must be noted that this majority of jurists did not rule that equality in distribution of gifts is a requirement (*wājib*). They thus maintain that a person has the right to use his property as he sees fit, including giving it to inheritors or others. They thus interpreted the above listed *Hadīths* as a strong recommendation (*nadb*) of equality in the shares of all children in gifts. They further interpreted as a recommendation the narration of the *Hadīth* in Muslim, where the Prophet (pbuh) said: “Would you like them to be equally good to you?”, and the father said “yes”, then the Prophet (pbuh) said, “then do not distribute the gifts unequally”.
- On the other hand, a few jurists, including ’Aḥmad, Al-Thawrī, Tāwūs, and ’Ishāq, ruled that equality in gift distribution among children was a requirement (*wājib*). Thus, they rendered invalid any gift distribution that does not observe such equality. Their proof was based on the above referenced *Hadīth*⁴ that included the admonition “be wary of Allāh” and the injunction “be fair among your children”. Also, they used as proof the above referenced evidence that the Prophet (pbuh) said “then do not distribute the gifts unequally”, and the narration that added “I shall not be a witness for injustice”.

However, this group of jurists differed over their definition of “equality”. Some followed the view that equality entails equal shares for males and females alike, based on the language of the *Hadīth* in Al-Nasā’ī, in which the Prophet (pbuh) was narrated to have said: “Then why don’t you distribute it equally among them”, as well as the *Hadīth* in ’Ibn Hibbān and the above referenced *Hadīth* of ’Ibn ’Abbās, all of which indicate equal shares.

However, as we shall soon see, the Ḥanbalīs interpreted equality to mean following the rules of inheritance by giving each male twice the share of each female.

Moreover, it was narrated that ’Aḥmad ruled that unequal distribution is permissible if dictated by some reason. For instance, he allowed it if one of the children had a greater need for assistance due to chronic illness, indebtedness, the size of his family, or occupation with his religious studies.⁵

Al-Shīrāzī ((Shāfi’ī), vol.1, p.446), Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), vol.2, p.401).

⁴Narrated by Al-Bukhārī and Muslim on the authority of Al-Nu’mān ibn Bāshīr, c.f. Al-Shawkānī (, vol.6, p.6).

⁵The *fatwā* committee of Al-Azhar issued an answer to the question whether or not it is permissible to give unequal gifts to inheritors. We list part of the answer below:

First: parents should be fair by giving equal shares to children in gifts and expenditures, to the best of their abilities. The general rule of equal division follows from the above listed *Hadīths*. Deviation from this rule is only permissible for one of the reasons listed below.

Second: If a father spends a significant amount on one of his children (e.g. by paying his dowry in marriage, or paying for his education to enable him to get a better job, or if he buys furniture for his marrying daughter, etc.), he must compensate the rest of his children by giving them an equal amount.

Third: It is permissible to give more to one of the children if there is a legal reason.

- The Hanafī jurist Muhammad and the Hanbalīs ruled that a father may distribute his wealth among his children according to the rules of inheritance, thus giving each male twice the share of each female. They ruled thus since this is the division dictated by Allāh (swt), and thus it is the most worthy division rule to follow. In this regard, there is no reason to distinguish between dividing this wealth among his children after his death and distributing it before, since distributing his wealth during his life is simply a hastening of that inevitable distribution after his death. Thus, they ruled that the rules of division should be the same in both cases.⁶

39.2 Gifts to one's parents

It is also preferable to observe equality when giving gifts to one's parents, although it is permissible at times to give more to, and show more generosity towards, the mother. This ruling is based on the *Hadīth* narrated by Al-Bukhārī and Muslim on the authority of 'Abū Hurayrah (mAbpwh) that a man came to the Prophet (pbuh) and asked him: "Who is the person most worthy of my generosity?" He (pbuh) said: "Your mother". The man asked: "Followed by whom?". He (pbuh) said: "Then, your mother". The man asked: "Followed by whom?". He (pbuh) said: "Then, your mother". The man asked [a third time]: "Followed by whom?", and the Prophet (pbuh) said: "Then, your father".

39.3 Gifts to siblings

Finally, equality is also recommended for gift giving to one's siblings at special occasions and otherwise, provided that they are equally well-off or in need. However, it is permissible to give more to the oldest sibling, based on the *Hadīth*: "The rights of the oldest siblings on the younger ones are equal to the father's rights on his children". Another narration of the *Hadīth* states: "The oldest brother has the same status as the father".⁷

Legal reasons for such unequal distribution include having a handicap that affects the child's earning ability, blindness, paralysis, other impediments to earning a living, and occupation with religious studies.

Reference: *Majallat Al-'Azhar*, year 14, issue #3.

⁶Ibn Qudāmah (, vol.5, p.604), 'Ibn Juzayy ((Mālikī), p.367), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.335).

⁷The first *Hadīth* was narrated by Al-Bayhaqī on the authority of Sa'īd ibn Al-Āṣ with a weak chain of narration. The second also has a weak chain of narration, and it was narrated by Al-Bayhaqī, Al-Tabarānī, and 'Ibn 'Udayy, on the authority of Kulayb Al-Juhanī.

Chapter 40

Definition and Legality

The term “deposit” (*'idā*) is used in English to describe both the deposited object, as well as the contract of depositing an object with another, i.e. giving an object to another for safekeeping. We shall use the terms “depositor” for the one who makes the deposit, and “depositary” for the one who keeps the deposit. The following are definitions of the deposit contract as provided by the different schools of Islamic jurisprudence:

- Some Ḥanafīs defined the contract as an implicit or explicit empowerment of another for safekeeping one’s property.¹ The contract is thus concluded explicitly if one person says to another: “I leave this item with you for safekeeping”, and the other says: “I accept”. If the latter party never responded, the contract would still be concluded with implicit acceptance.
- The Shāfi‘īs and Mālikīs defined the contract as giving another person a agency (*tawkīl*) for safekeeping one’s property or legal possession.² Thus, deposited items may include legally possessed wine (e.g. if the person owned it prior to converting to Islām), leather that can be purified by tanning, and hunting dogs. On the other hand, deposits are not permitted items that cannot be legally possessed, e.g. dogs with no permissible use, and lost properties.

The deposit contract is permissible, and recommended, with proofs based on Qur’ān, *Hadīth*, and consensus:

- Proof in the Qurān can be found in the verses: “Allāh commands you to return trusts to those to whom they are due” [4:58], and “and if one deposits a thing or trust with another, let the trustee discharge his trust” [2:283].

¹Ibn Al-Humām ((Hanafī), vol.7, p.88), Ibn ‘Ābidīn ((Hanafī), vol.4, p.515), *Majma‘ Al-Damānāt* (p.68).

²Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.3, p.79), *Hāshiyat Qalyūbī wa ‘Umayrah* (vol.3, p.180), *Sharh Al-Tahrīr* (p.167), Al-Ramlī ((Shāfi‘ī), vol.5, p.87), *Hāshiyat Al-Sharqāwī* (vol.2, p.96 onwards), *Hāshiyat Al-Dusūqī* (vol.3, p.419).

- Proof of legality is also provided by the *Hadīth* according to which the Prophet (pbuh) said: “Return trusts to the one who entrusted you, but do not betray the one who betrayed you”.³
- Finally, jurists throughout the history of Islām have agreed that the deposit contract is permissible, based on the need (nay, necessity) of asking others to hold one’s property for safekeeping.⁴

³Narrated by ’Abū Dāwūd and Al-Tirmidhī, who rendered it a good narration (*Hadīth hasan*). It was also narrated and validated by Al-Ḥākim. On the other hand, ’Abū Ḥātim Al-Rāzī questioned its authenticity, and a number of its narrations in Al-Bayhaqī, Al-Dāraqutnī, Mālik, ’Ahmad and ’Abū Nuṣaym, were based on questionable chains of narration. Narrations exist for *Hadīths* to the same effect exist in ’Ibn Al-Jawzī, and Al-Dāraqutnī on the authority of ’Ubayy ibn Ka’b. Other versions in Al-Bayhaqī and Al-Dāraqutnī on the authority of ’Abū ’Umāmah are based on weak chains of narration. There are also narrations on the authority of an unknown companion of the Prophet (pbuh), with another missing link in the chain of narration, in ’Ahmad, ’Abū Dāwūd, and Al-Bayhaqī. Moreover, Al-Imām Al-Shāfi’ī argued that this is not an established *Hadīth*. However, Al-Shawkānī () argued that the *Hadīth* may be used as a legal proof, based on the fact that two of the major narrators of *Hadīth* considered it valid, and one considered it valid, c.f. ’Ibn Ḥajar (, p.270), Al-Shawkānī (, vol.5, p.297), Al-San‘ānī (2nd printing, vol.3, p.68).

⁴ibid., ’Ibn Qudāmah (, vol.6, p.382), Al-Sarakhsī (1st edition (Hanafī), vol.11, p.109).

Chapter 41

Deposit Cornerstones and Conditions

The Ḥanafīs stipulated only two cornerstones for the deposit contract: offer and acceptance.¹ The majority of jurists enumerated four cornerstones: (i-ii) depositor and depositary, (iii) deposited object, and (iv) contract language (offer and acceptance).² In this regard, the acceptance may be verbal (e.g. “I accept your deposit”), or it may be implied through physical receipt and silence. The latter behavior is deemed acceptance in analogy to the direct exchange sale contract (*mu^cāṭāḥ*), where verbal acceptance is not necessary.

The Ḥanafīs stipulated that the depositor and depositary must be sane and discerning, thus restricting the insane and young children from making or receiving deposits. However, they did not stipulate a condition that the depositor or depositary must be of legal age. Thus, the discerning child who has trading privileges may make or accept deposits, since eligibility to trade makes him eligible to accept others’ property for safekeeping. On the other hand, if the child is under legal restrictions not to trade, then he is not eligible for deposits.³ On the other hand, the majority of jurists posited the same conditions in depositors and depositary that they posited for parties in a agency: sanity, discernment, and being of legal age.

The object of deposit must be a form of property that can be possessed physically. Thus, deposits of runaway animals or birds in the sky are not guaranteed by the depositary.⁴

¹ Al-Kāsānī ((Hanafi), vol.6, p.307), *Majma^c Al-Damānāt* (p.68).

² Al-Dardīr ((Mālikī)A, vol.3, p.419), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.3, p.80), Al-Buhūtī (3rd printing (Hanbalī), vol.4, p.186), Mar^cī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.269). The Shāfi‘ī is ruled that it is not necessary for the depositary to accept the deposit verbally. Thus, they consider receipt of the deposited item (movable or immovable) to be tantamount to acceptance of the deposit, in analogy to the agency contract.

³ Al-Kāsānī ((Hanafi), ibid.).

⁴ Ibn ^cĀbidīn ((Hanafi), vol.4, p.516).

Chapter 42

Status, and Methods of Safekeeping

The deposit contract makes it binding on the depositary to safekeep the owner's property. In this regard, the depositor's initiation of this contract is a form of entrusting of the depositary, and acceptance of a deposit is a form of accepting the trust for safekeeping the deposited items. Thus, safekeeping the deposit becomes binding on the depositary following the Prophet's (pbuh) *Hadīth*: "Muslims are bound by their conditions".¹

42.1 Joint depositors

If two depositors make a joint deposit, and then one of the two comes alone to demand returning the deposit, then 'Abū Hanīfa ruled that the depositary is not allowed to give it to him in the absence of the other depositor. His ruling is based on the view that the deposit is considered a common property of the two depositors, and each depositor's right can only be separated by dividing the deposit. In this regard, the depositary is only considered a legal agent for safekeeping, and he is not permitted to divide the property to give one depositor his right. This is contrasted with the case of demanding one's share of a joint debt, in which case one of the two creditors may demand his share of the debt, since debts can be paid with their equivalents. Thus, while the repayment of a

¹This is part of a longer *Hadīth* narrated on the authority of 'Abū Hurayrah and ^cAmr ibn ^cAwf. 'Abū Dāwūd, 'Ibn Ḥibbān, and Al-Ḥākim narrated the *Hadīth* on the authority of 'Abū Hurayrah. Also, 'Ibn Mājah and Al-Tirmidī narrated it on the authority of ^cAmr ibn ^cAwf, with the latter validating it, with the text: "Arrangements among Muslims are permissible, provided that the pacts do not forbid anything permissible, or permit anything that is forbidden". Al-Tirmidī's version, which he validated, contained the continuation: "And Muslims are bound by their conditions, except for conditions that forbid something permissible, or permit something forbidden". The full *Hadīth* with the continuation was also narrated by Al-Ḥākim, who did not discuss its validity, c.f. Al-Ḥāfiẓ Al-Zayla^ī (1st edition, (*Hadīth*), vol.4, p.112), Al-Ṣan^cānī (2nd printing, vol.3, p.59).

part of the debt does not involve dealing in the property of another, returning one depositor's share of a joint deposit does require such dealing in the property of another, and hence it is not permissible.

In contrast, 'Abū Yūsuf and Muḥammad argued that the depositary is indeed permitted to divide the deposit and give one of the depositors his share if he demands it. However, they ruled that this division is not considered a division with respect to the rights of the absent depositor. Thus, if the remaining half of the deposit were to perish in the possession of the depositary, the absent depositor would then share half of the first depositor's collected half. Their proof in this case diverges from the logic of 'Abū Ḥanīfa by arguing that the case is indeed analogous to collecting one's share of a joint debt.²

42.2 Joint depositaries

If one depositor makes a deposit to two depositaries, and if the deposit is divisible, then each of them may take half for safekeeping. In this case, the depositor authorized both of them to keep his property, without specifying any particular one of them for the physical safekeeping. Thus, the three major Ḥanafī jurists agreed that if the deposit is not divisible, then one of the depositaries must keep it, and neither one would guarantee the deposit. However, they differed in opinion over the case where one of the depositaries keeps the full deposit, when the latter is divisible:³

- 'Abū Ḥanīfa ruled that if one of the depositaries keeps the entire deposit, the other depositary still guarantees half. This follows from the general principle that any two individuals' responsibility for a divisible property is divided in half. Thus, if one of them delegates to the other safekeeping all of the deposit, he must still guarantee his half of the responsibility, unless the depositor agrees to make the deposit exclusively the responsibility of the other depositary.
- In contrast, 'Abū Yūsuf and Muḥammad ruled that the depositary who delegates to the other is absolved from guaranty. This ruling is based on the view that the depositor thus entrusted both depositaries with the deposit, and this implies empowerment for either depositary to delegate the safekeeping to the other. Thus, they ruled that the deposit is not guaranteed by either, in analogy to the case of indivisible deposits.

42.3 Methods of safekeeping

Jurists expressed varying opinions on how the depositary must keep the deposit. In what follows, we give a summary of the varying opinions:

²Ibn Al-Humām ((Hanafi), vol.7, p.94 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.11, p.123), *Majma^c Al-Damānāt* (p.78).

³Ibn Al-Humām ((Hanafi), vol.7, p.96), *Majma^c Al-Damānāt* (p.78), ^cAbd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.199).

- The Ḥanafīs and Ḥanbalīs ruled that the depositary should keep a deposit in the same manner he keeps his own property. Thus, they ruled that he may keep it himself, or he may leave it in the possession of any of his dependents, e.g. his wife, children, servants, etc.

The Ḥanafīs also allowed a depositary to keep a deposit with anyone who keeps his property, even if that person is not his dependant. Thus, they ruled that he may keep a deposit with his partner in a limited or unlimited partnership. However, they excluded temporary employees from keeping deposits left in his safekeeping.⁴

If the depositary were to keep a deposit with any party other than the ones mentioned above, the Ḥanafīs and Ḥanbalīs ruled that he must thus guarantee the deposit under general circumstances. This ruling follows from the fact that the depositor entrusted the deposit to be kept in his possession, and not in the possession of others. Exceptions to this general rule were stipulated for unusual circumstances. For instance, if the depositary's house was threatened by fire, or if his ship were threatened by wind, then he may give the deposit to someone in a safer house or ship. However, in such cases, the depositary's claim that he had to give the deposit to someone who does not normally keep his own property must be supported by a proof. This follows since guaranty is automatically established by the depositary behavior, and he needs to provide a proof to drop the guaranty.

- The Mālikīs ruled that the depositary may keep a deposit with his trustworthy long-term dependants, as well as trust worthy long-term employees with whom he customarily keep his own property. Thus, they would not allow a depositary to keep a deposit with a wife he had just married or a new lessee.⁵
- The Shāfi‘īs ruled that the depositary must keep the deposit himself, and did not allowed him to leave it with anyone, including his wife and children without excuse, except by permission from the depositor. This ruling is based on the view that the depositor entrusts the deposit only to the depositary, to the exclusion of all others. Thus, if the depositary violates that trust without an excuse, then he must guarantee the deposit. Valid excuses that allow the depositary to violate this general rule, without assuming guaranty, include sickness and travel.

⁴Al-Sarakhsī (1st edition (Hanafi), vol.11, p.109), 'Ibn Al-Humām ((Hanafi), vol.7, p.89), *Majma‘ Al-Damānāt* (p.77), Al-Kāsānī ((Hanafi), vol.6, p.207), 'Ibn Qudāmah (, vol.6, p.385), ⁵Abd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.197).

⁵*Hāshiyat Al-Dusūqī* (vol.3, p.423), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.307).

Chapter 43

Status of Deposit Possession

Jurists of all schools agree that safekeeping of deposits is recommended, and that the depositary receives religious credit for his safekeeping efforts. Moreover, they all agree that the possession of a deposit is a trust possession, and that the depositary only assumes guaranty if the deposit is adversely affected due to his negligence or transgression. This ruling is based on the *Hadīth*: “The non-transgressing depositary does not guarantee the deposit”,¹ as well as the more general *Hadīth*: “A trustee does not guarantee”.² In this regard, the Hanafīs ruled that any condition of guarantee in a trust contract is considered invalid.

Given the nature of the depositary’s possession, it follows that the depositary must return the deposit to the depositor at the latter’s request, if that is at all possible. This follows directly from the verse: “Allāh commands you to return trusts to those to whom they are due” [4:58]. Moreover, both parties have the right to void the deposit contract without the permission of the other. This follows from the fact that the contract is permissible but non-binding. Thus, the depositor may demand his deposit at any time, and the depositary may return the deposit at any time.

The above referenced verse also implies that the deposit must be given back to the depositary himself. Thus, if he were to return the deposit to the depositor’s house in his absence, or if he gives it to one of the depositor’s dependants,

¹Narrated by Al-Dāraqutnī and Al-Bayhaqī in their *Sunan* on the authority of ‘Amr ibn Shu‘ayb, his father, and his grandfather, that the Prophet (pbuh): “The non-transgressing depositary does not guarantee the deposit, and the non-transgressing borrower does not guarantee the loan”. However, ’Ibn Hajar said that the chain of narration of this *Hadīth* contains two weak links. Al-Dāraqutnī also said that the chain of narration does not go up to the Prophet (pubh), and he narrated other weak versions that state: “A trustee does not guarantee”, c.f. Al-Hāfiẓ Al-Zayla’ī (1st edition, (*Hadīth*), vol.4, p.115), ’Ibn Hajar (, p.270), Al-Shawkānī (, vol.5, p.296).

²Narrated by Al-Dāraqutnī on the authority of ‘Amr ibn Shu‘ayb, his father, and his grandfather. However, its chain of narration contained weak links, c.f. Al-Shawkānī (, vol.5, p.296).

the depositary must guarantee the deposit. This follows from the fact that the depositor never accepted his defendant's possession when he accepted the depositary's possession. This ruling differs from the case of borrowed items and leases, where returning the items to the owner's house or giving them to one of his dependents would drop his guaranty. The latter behavior is customary in normal leases and loans. However, if the owner had lent out a valuable object (e.g. jewelry), the borrower would have to guarantee the object if he did not return it to the owner. In this regard, it is not customary for deposits to be delivered to anyone other than the depositor, and hence the depositary would guarantee the deposit against damages and losses if he delivers it to anyone else.

43.1 Disputes

If the depositor demands the return of his deposit, and the depositary first says: "You never deposited anything with me", then later said: "The deposit perished", then he clearly would have violated the depositor's trust. Therefore, he would guarantee the deposit in this case. However, if the depositary had said: "You have no right to demand this from me", and then explained: "The deposit perished", then his claim is accepted if supported by his oath. Moreover, the depositary's claims regarding perishing or returns of the deposits are generally accepted in a similar manner, as detailed below:³

- If the depositary claims that the deposited items perished in his possession, or if he claims that he had returned the deposit, but the depositor denies his claim, the depositary's claim is accepted. This follows from the preceding characterization of the depositary as a trustee.
- The depositary guarantees the deposit in two cases:
 - If the depositor can provide material proof of his claim, the depositary must guarantee the deposit.
 - In the absence of a material proof, if the depositary is requested to take an oath, and he refuses, then he must guarantee the deposit.
- On the other hand, if the depositor provides material proof that the deposit was adversely affected by the depositary's transgression and the depositary provided material proof that the negative effect occurred on its own, the depositor's proof is given priority. In this case, the depositor's proof is stronger since it establishes both that the deposited items became defective, as well as the depositary's transgression.

However, if the depositary were to provide material proof that the depositor had previously admitted that the deposit was adversely affected

³Al-Kāsānī ((Hanafi), vol.6, p.210), 'Ibn Al-Humām ((Hanafi), vol.7, p.89), ^cAbd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.196), *Majma' Al-Damānāt* (pp.68,87,89), 'Ibn ^cĀbidīn ((Hanafi), vol.4, p.516), Al-Khatīb Al-Shirbīnī ((Shāfi'i), vol.3, p.81), *Hāshiyat Qalyūbī wa ^cUmayrah* (vol.3, p.182), 'Ibn Qudāmah (, vol.6, p.382).

without his transgression, this new proof will be accepted, thus negating the depositor's proof.

Chapter 44

Deposit Guarantee

The possession of a deposit is converted from a trust to a guaranty in a number of cases. In what follows, we consider the causes for such conversion in some detail.¹

44.1 Abandon of safekeeping

If the depositary were to abandon his obligation for safekeeping the deposit, he must guarantee the deposit. This follows from the fact that the deposit contract is binding on the depositary, who is responsible for its safekeeping. Thus, if the depositary were to see a thief stealing the deposit, and if he can stop him but does not, he would have violated the contract's requirements, and thus must guarantee the deposit.

44.2 Re-deposit with ineligible parties

If the depositary re-deposits the deposit, without a valid excuse, with someone who does not qualify as a trust-worthy dependent, or someone with whom he commonly keeps his own property, he would be obliged to guarantee the deposit. This follows from the fact that the depositor entrusted the depositary for safekeeping the deposit, to the exclusion of others. However, if a valid excuse prompted the re-deposit (e.g. threat of fire or drowning), then the depositary need not guarantee the deposit. In the latter cases, the re-deposit was a means of better safekeeping, and the depositor is deemed to have given implicit permission for taking such measures to ensure the safety of the deposit.²

Jurists differed over the case where a depositary re-deposits items without a

¹ Al-Kāsānī ((Hanafi), vol.6, p.211 onwards), 'Ibn Al-Humām ((Hanafi), vol.7, p.91), Al-Sarakhsī (1st edition (Hanafi), vol.11, p.113), *Majma' Al-Damānāt* (p.68).

² Al-Kāsānī ((Hanafi), vol.6, p.208), 'Ibn Al-Humām ((Hanafi), vol.7, p.91), Al-Sarakhsī (1st edition (Hanafi), vol.11, pp.125,132), 'Ibn 'Abidīn ((Hanafi), vol.4, p.516).

valid excuse, and then the items perish in the possession of the second depositary:

- The Ḥanafīs and Ḥanbalīs ruled in this case that guaranty is established only for the first depositary and not for the second.³ This ruling is based on the view that the second depositary was done as a favor to the initial depositor by safekeeping his property. In this regard, they quoted the verse: “There is no ground for complaint against those who do good” [9:91]. However, the first depositary is excluded from this Text since he violated a condition of the deposit contract.
- ’Abū Yūsuf and Muhammad ruled that the original depositor has an option in this case whether guaranty is established for the first or the second depositary. If he chooses to deem the first depositary a guarantor, the guaranty clause renders him an owner of the deposit, and thus the second depositary is exempted from guaranty towards the first depositor. On the other hand, if the first depositor demands compensation from the second depositary, the latter may demand compensation from the first depositary, who gulled him through the re-deposit.

The reasoning behind giving the first depositor this option is based on the fact that both depositaries qualified as guarantors. The first depositary qualified as a guarantor by giving a person’s property to another without permission, while the second qualifies thus for accepting receipt of another’s property without his permission.

- If the second depositary consumed the object, all jurists agree that the first depositor has the option of rendering the first or the second depositary as the deposit’s guarantor. In this case, if the first depositor chooses to demand guarantee from the first depositary, the latter may demand guarantee from the second depositary. This follows from the fact that the second depositary established his responsibility for guarantee by consuming the deposit. On the other hand, if the first depositor demands guarantee from the second depositary, the latter does not have the right to demand compensation from the first depositary. This follows from the fact that the first depositary gave the deposit to the second for safekeeping, but he consumed it instead, thus absolving the first depositary of responsibility for his action.

Jurists also differed in their rulings in the case where the reason for establishing guaranty is removed:

- The general rule among the majority of Ḥanafīs is that removal of the cause for guaranty absolves the guarantor of his responsibility. For instance, if the first depositary were to recollect the deposit from the second depositary, and proceeds to keep it in accordance with the first contract, he is no longer deemed a guarantor for the deposit. Thus, by removing

³Ibn Rajab (1st edition (Hanbali), p.217).

the reason for guaranty, the depositary is again considered a trustee, and thus he does not guarantee the deposit, except against losses due to his negligence or transgression.⁴ This ruling is in contrast to the corresponding rulings for lessors and borrowers. In the latter cases, a violation of the contract establishes guarantee irrevocably, even if the cause of guaranty were removed.

- Zufar, Al-Shāfi‘ī, and other major scholars established the general rule that if a deposit becomes guaranteed for any reason, the guarantee remains in place, even if its initial cause were removed. In this case, they ruled that the establishment of guaranty changes the nature of the contract irrevocably. Thus, the contract can only return to its original status through renewal, as if it had ceased to exist in its original form. This ruling is made in analogy to the case where the depositary denies having received a deposit, and then admits that he had indeed received it.⁵

44.3 Utilization of the deposit

All jurists agree that the depositary assumes guaranty of the deposit if he utilizes it (e.g. wearing a deposited dress, or riding a deposited riding animal). However, jurists differed in their rulings if the depositary ceases to utilize the deposit:

- As we have already seen, the majority of Ḥanafīs ruled in this case that the reason for establishing guaranty had ceased to exist, and the depositaries possession continues to be in effect with the depositor's permission. Thus, they ruled that the guaranty is dropped, in analogy to the status of the contract prior to his utilization of the deposit.⁶
- the Mālikīs, Shāfi‘īs, and Ḥanbalīs ruled that the depositary guarantees the deposit after its use, even against the effects of natural causes. Thus, their ruling is based on the view that once the depositary utilized the deposit, his possession ceased to be a possession of trust. As we have seen, they view his actions in this case to be analogous to denying having received a deposit and then admitting it. Therefore, the depositary may only be absolved of the guaranty in this case by returning the deposit to its owner.⁷

⁴ Al-Kāsānī ((Ḥanafī), vol.6, p.212), 'Ibn Al-Humām ((Ḥanafī), vol.7, p.92), *Majma‘ Al-Damānāt* (pp.73,76 onwards).

⁵ Al-Khaṭīb Al-Shirbīni ((Shāfi‘ī), p.90).

⁶ Al-Kāsānī ((Ḥanafī), vol.6, p.211), Al-Sarakhsī (1st edition (Ḥanafī), vol.11, p.123).

⁷ Al-Khaṭīb Al-Shirbīni ((Shāfi‘ī), vol.3, p.88), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.362), *Hāshiyat Al-Dusūqī* (vol.4, pp.420,427), 'Ibn Juzayy ((Mālikī), p.374), 'Ibn Qudāmah (, vol.6, p.401).

44.4 Traveling with the deposit

Jurists differed in their rulings regarding the depositary's right to travel with the deposit, and the resulting rulings if he does. In what follows, we present the different opinion in some detail:

- 'Abū Ḥanīfa ruled that a depositary has the right to travel with the deposit, provided that the depositor did not explicitly forbid him from doing so, and as long as the travel route is safe. Thus, he ruled that the deposit contract was unrestricted by any geographic area, and such restrictions require explicit proof. Thus, if the depositary travels with the deposit, and it is adversely affected by a natural cause, he does not guarantee it.
- 'Abū Yūsuf and Muḥammad ruled that the depositary is not allowed to travel with the deposit if its transportation is difficult or costly. In this regard, they ruled that the depositor may be exposed to an additional cost of retrieving his property if the depositary were to die while traveling with the deposit. However, if the deposit can be transported with minimal effort and cost, the depositary is permitted to take it in travel.⁸
- The Mālikīs ruled categorically that a depositary may not travel with a deposit, unless he receives it while traveling. Thus, they ruled that under normal circumstances, the depositary must keep the deposit in the same city. In this case, he is permitted to re-deposit it with a trustworthy resident of that city, and he bears no guaranty for the object, whether or not he has the ability to deliver it to legal authorities.⁹
- The Shāfi'īs and Ḥanbalīs also ruled categorically that a depositary is not allowed to travel with a deposit. However, they ruled that if needs to travel, then he must return it to its owner, his legal agent, or legal authorities, in that order. The ruling is based on the view that the depositary holds the deposit as a voluntary uncompensated act, and thus he is not bound to keep it. In this regard, if he cannot deliver the deposit to its owner or his legal agents, legal authorities can play the role of de facto legal agents of the owner. If the depositary were to travel with the deposit, they ruled that he would thus guarantee it, since travel adds a risk factor to his possession, whether or not the travel route is considered safe.¹⁰ The fact that all types of travel involve additional risk is supported by the *Hadīth*: “The traveler and his property are exposed to risk of perishing, except to the extent that Allāh protects them”¹¹

⁸Al-Kāsānī ((Hanafi), vol.6, p.209), 'Ibn Al-Humām ((Hanafi), vol.7, p.93), 'Ibn Ḩābidīn ((Hanafi), vol.4, p.521), Al-Sarakhsī (1st edition (Hanafi), vol.11, p.122), *Majma' Al-Damānāt* (p.69).

⁹'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.307), *Hāshiyat Al-Dusūqī* (vol.3, pp.421,423).

¹⁰Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.3, p.82), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.361), *Al-Qāmūs Al-Muhiṭ* (vol.1, p.183).

¹¹Narrated in 'Akhbār 'Abī Al-^cAlā' Al-Ma^carrī on the authority of 'Abū Hurayrah: “If only people knew the extent of Allāh's mercy for travelers, all people would be in constant

44.5 Denial of delivery

If the depositor demands return of his deposit, but the depositary denies having received it, or refuses to deliver it despite his ability to do so, he is thus considered a usurper. Thus, by demanding the return of his deposit, the depositor denied the depositary's right to possess the item, and the depositary becomes a usurper if the depositor's claim is accepted. Thus, the depositary guarantees the item in one of three cases: (i) if the depositor supports his claim with an oath, (ii) if the depositary admits that the depositor's claim is valid, or (iii) if the depositary refuses to take an oath supporting his own claim. In this regard, even if the depositary first denies having received a deposit, and then he admits having received it, the initial contract is no longer in effect, and the depositary's guaranty remains in place.

On the other hand, if the depositary first denies that he had ever received the deposit, and then he proves that he had received it but that it perished, we need to consider three cases:

1. If his proof shows that the deposit perished after he had denied receiving it, his proof is ignored. In this case, the initial contract ceased to exist at the moment of his denial, and thus his guaranty remains in place.
2. If his proof shows that the deposit had perished before his denial, then the proof is accepted, and he is not responsible to guarantee the object.
3. If he claims that it had perished before his denial, but fails to produce a proof, then he may demand that the depositor take an oath. In this case, the judge has to demand an oath from the depositor that the deposit perished after the depositary's denial. Then, the depositary becomes a guarantor of the deposit if and only if the depositor takes that oath.¹²

44.6 Mixing deposits with other properties

If the depositary mixes the depositor's property with his own in a manner that allows him to identify them separately, he should continue to keep them identified, and bears no other responsibility. On the other hand, jurists ruled differently in the case where the mixture makes it impossible to identify the deposit separately:

travel. Indeed, the traveler and his possessions are in danger of perishing, except to the extent that Allāh protects them". 'Ibn Hajar said that a different line of narration was provided by 'Abū Mansūr Al-Daylāmī in *Musnād Al-Firdaws*. It was also narrated with an incomplete chain of narration by Al-Qādī Al-Nahrawānī in *Kitāb Al-Jalīs wa Al-'Anīs*. On the other hand, Al-Nawawī questioned this *Hadīth* in *Al-Majmū'*, ruling that it was someone else - perhaps ^cAbī ibn Abī Tālib, and not the Prophet (pbuh) who made the statement, c.f. 'Ibn Hajar (, p.271), Al-^cAjlūnī (, p.255).

¹² Al-Sarakhsī (1st edition (Hanafī), vol.11, p.116 onwards), Al-Kāsānī ((Hanafī), vol.6, p.212), 'Ibn Al-Humām ((Hanafī), vol.7, p.93), *Majma'* *Al-Damānāt* (p.84 onwards).

- 'Abū Ḥanīfa ruled that mixing a deposit with his own property, or mixing two deposits, in a manner that makes it impossible to identify the deposit separately, then he must guarantee it with its equivalent. This lack of identification clearly applies to fungibles (e.g. money, grains, and other goods measured by weight and volume). In all such cases, 'Abū Ḥanīfa ruled that mixture is equivalent to causing a defect in the deposit, thus he must guarantee it with its equivalent. This ruling applies to mixing items of different genera (e.g. wheat with barley), or the same genus (e.g. barley with barley).
- 'Abū Yūsuf and Muḥammad ruled that the depositor has an option to do one of three things in those cases: (i) he may enforce the depositary's guaranty to return an equivalent amount, (ii) he may take half of the mixture, or (iii) he may force a sale of the mixture and share the price. This ruling was based on their view that the deposit in fact continued to exist intact, but the mixture only prevented him from collecting it.¹³

In all those cases, if the depositary were to die without identifying the deposit in the mixture, then, if the deposit is known, it must be returned to the depositor. This follows from the *Hadīth*: "Whoever knows the identity of his property, he should collect it".¹⁴ However, if the deposit cannot be identified, then it is guaranteed and established as a liability on the depositary's estate. In this case, the depositary would have died with the deposit unknown, which is legally equivalent to causing a defect.

In general, there are three cases where death of a person, together with non-identification of another's property, would render trusts guaranteed:

1. If the manager of an Islamic Trust (*waqf*) dies with the income of the *waqf* not identified.
 2. If a judge dies without identifying properties of orphans deposited with him or with others.
 3. If a governor dies without identifying with whom he had deposited public properties such as spoils of war.¹⁵
- The major scholars of other juristic schools agreed with 'Abū Ḥanīfa that the depositary guarantees the deposit in the case of mixture that prevents

¹³Al-Sarakhsī (1st edition (Hanafi), vol.11, p.110), 'Ibn Al-Humām ((Hanafi), vol.7, p.92), Al-Kāṣānī ((Hanafi), vol.6, p.213), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.519), *Majma' Al-Damānat* (pp.83 onwards, 87).

¹⁴Narrated by 'Aḥmad, 'Abū Dāwūd, and Al-Nasā'ī on the authority of Al-Ḥasan ibn Samurah thus: "Whoever finds his property in the possession of another, he should take it, and the buyer should deliver the price to the seller". Another version was narrated thus in 'Aḥmad and 'Ibn Mājah: "If a man steals another's property, or if the latter lost his property, then if the owner finds his property in the possession of another, he should collect it. [If the possessor of the stolen or lost property obtained it through a valid sale, then the owner still collects his property, and] the buyer should demand reimbursement of the price from the seller", c.f. Al-Shawkānī (, vol.5, p.240).

¹⁵Ibn Nujayn (1290H (Hanafi), vol.2, p.67), 'Ibn Al-Humām ((Hanafi), vol.5, p.27).

identification. This ruling is also based on the view that the depositor did not permit such mixture.

- However, the Mālikīs ruled that if the deposit was mixed with property of the same genus (e.g. wheat with wheat, or gold coins with gold coins), then the depositary does not guarantee the deposit if he mixed such properties to simplify their storage. Otherwise, they agree with the other schools that he would guarantee it.
- If mixture did not prevent the deposit from being identified, and the deposit did not lose value because of the mixture, all the jurists agree that the depositary does not guarantee the deposit. On the other hand, if the mixture caused a loss of value for the deposit, the Shāfi‘īs and Ḥanbalīs ruled that the depositary guarantees the deposit in this case.¹⁶

44.7 Violating depositor conditions

This section deals with the case where a depositor makes it a condition that the depositary holds the deposit in a specific place (e.g. a particular house, or a particular box). Then, if the depositary places the deposit in a different place without the depositor’s permission, most jurists agree that he guarantees it if he placed it in a less secure place, and does not guarantee it if he placed in a place that is equally or more secure.

On the other hand, jurists differed in their assessments if the depositor explicitly forbade the depositary from placing the deposit anywhere other than the one stated in the condition:

- The Ḥanafīs, Mālikīs, and Shāfi‘īs ruled in this case that the restriction to a specific place does not serve any purpose. Thus, they ruled in this case as well that the depositary guarantees the deposit if he places it in a less secure place, but does not guarantee it if he places it in an equally secure or more secure place.
- The Mālikīs added that the depositary guarantees the deposit if he moved it from one city to another.¹⁷
- The Ḥanafīs explicitly stated that the depositary does not guarantee the deposit if he violates a depositor condition not to move the object and not to give it to his wife. They argued that the depositary has no option but to leave the object with his wife if he needs to leave the house. Thus, even if the condition can be beneficial to the depositor, it cannot be met by the depositary, and hence he does not guarantee the deposit in this case.¹⁸

¹⁶ *Hāshiyat Al-Dusūqī* (vol.3, p.420), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.3, p.89), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.361), ’Ibn Qudāmah (, vol.6, pp.383,387).

¹⁷ Al-Sarakhsī (1st edition (Hanafi), vol.11, p.121), ’Ibn Al-Humām ((Hanafi), vol.7, p.97), *Majma‘ Al-Damānat* (p.69 onwards), Al-Kāsānī ((Hanafi), vol.6, p.210), *Hāshiyat Al-Dusūqī* (vol.3, p.423), *Hāshiyat Al-Sharqāwī* (vol.2, p.99), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.359 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.3, pp.84-86).

¹⁸ Abd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.200).

- Most of the Hanbalīs ruled that the depositary in this case guarantees the deposit regardless of where he moved it, and regardless of how secure the new place may be. Thus, they argued that the depositary in this case would have violated the depositor's condition without any benefit in so doing. In this regard, violating the depositor's condition without any reason is not permissible.

However, if he felt that he needed to move the deposit to a safer place for fear that it may perish, then they ruled that he should move it. Indeed, they ruled in this latter case that if he does not move it and his fear of perishing is realized, he would then guarantee it. Thus, they render the depositor's condition not to move the object to be concerned primarily with its safety. If that safety can best be secured by moving the deposit, then the depositary should do so, and the condition is disregarded.¹⁹

44.8 Summary of Non-Hanafī conditions

We covered the cases whereby the depositary must guarantee the deposit according to the Hanafī classification. We have seen from the detailed discussions that there are many similarities, and few differences, between the schools of jurisprudence. In what follows, we list the cases where the depositary guarantees the deposit according to the classifications of those other schools:

- The Mālikīs enumerated six reasons for guaranteeing a deposit:²⁰
 1. The deposit is guaranteed if the first depositary re-deposits it without a legal excuse, even if the deposit is only lost after it is returned to the original depositary.
 2. Transporting the deposit from one city to another makes it guaranteed. However, transporting it from one house to another within a city does not.
 3. Mixing the deposit with goods of a different genus (e.g. wheat with barley), in a manner that makes it unidentifiable, makes the deposit guaranteed. However, if the mixture is separable, no guarantee is effected.
 4. If the deposit perishes while being utilized by the depositary, he must guarantee it. He must also guarantee any borrowed monies or fungibles measured by weight and volume if they perish while he is using them.
 5. Negligence or transgression (e.g. putting the deposit in a dangerous place, or showing a thief where it is) would result in a guarantee.
 6. A violation of an explicit condition stipulating how the deposit must be kept, e.g. if the depositor said that the items should not be locked

¹⁹Ibn Qudāmah (, vol.6, p.387 onwards).

²⁰Ibn Juzayy ((Mālikī), p.374).

into a container, but the depositary did that, would result in a guaranty.

- The Shāfi‘ī list of six reasons for guaranty is very similar to the Mālikī list. Thus, they ruled that the following actions would result in guaranty of the deposit:²¹
 1. Re-deposit with another without permission or a valid excuse.
 2. Placing the deposit in a less secure place than what is stipulated by the depositor.
 3. Moving the deposit to a less secure place.
 4. Not taking the necessary steps for safekeeping (e.g. not feeding a deposited animal).
 5. Violating a condition of how to keep the deposit, resulting in a defect.
 6. Utilization of the deposit, which they consider to be a form of transgression. Even if the depositary discontinues utilizing the deposit, his guaranty is not dropped unless the trust is renewed from the owner.
- The Ḥanbalis listed five actions that render a deposit guaranteed:²²
 1. Re-deposit with another without a legal excuse.
 2. Negligence or transgression (e.g. putting the deposit in a dangerous place, or showing a thief where it is).
 3. Violating any of the conditions of how it should be kept, even if it is kept in an equally safe place.
 4. Mixing the deposit with other properties in a manner that makes it unidentifiable.
 5. Utilization of the deposit. Even if the depositary discontinues utilizing the deposit, his guaranty is not dropped unless the trust is renewed from the owner.

44.9 Some subsidiary rulings

'Ibn Juzayy ((Mālikī), p.374 onwards) listed a number of subsidiary rulings pertaining to deposits:

1. If a depositary trades with deposited monies, the Mālikīs ruled that profits are a legal income for him. However, 'Abū Ḥanīfa ruled that such profits must be given away in charity, and some other jurists ruled that such profits belong to the owner.

²¹ Al-Sharqāwī ((Shāfi‘ī), p.167).

²² Mar‘ī ibn Yūsuf (1st printing (Ḥanbalī), vol.2, pp.269-272), 'Ibn Hubayrah ((Hanbalī), p.268 onwards).

2. Most jurists ruled that lending a non-fungible deposit is reprehensible. However, 'Ashhab ruled that it is permissible if the depositary lent such a deposit to a reliable and trustworthy individual.

Jurists agreed that lending non-monetary goods is not permissible. For items that are measured by weight or volume, jurists differed in their rulings depending on whether they drew analogies to money or to foodstuffs.

3. If a depositary is asked to return the deposit, and claims that it perished, his claim is accepted if he supports it with an oath.

If he claims that he had already returned it, then his claim is accepted if supported with his oath and there is no proof of having received it initially. If there is proof that he had received it, then the Mālikīs ruled that he needs to provide proof of delivery. However, 'Ibn Al-Qāsim, 'Abū Ḥanīfa, and Al-Shāfi'ī ruled that the depositary's claim is accepted even if there was an extant proof of his initial receipt.

4. A depositary may not demand wages for safekeeping the deposit. However, he may demand a lease payment if the deposit occupies a significant portion of his house. In this regard, if there are costs associated with providing appropriate containers or locks for the deposit, then the depositor should incur all such costs.

5. If one person denied having received a deposit from another, and later the second person had an opportunity to deny having received a deposit from the first, most of the Mālikīs ruled that he is not permitted to do so. However, some of the jurists ruled that he may, but that it is reprehensible, while others still ruled that such behavior is permissible.

Chapter 45

Termination of a deposit

A deposit is terminated by one of five events:

1. Return of the deposit to the depositor, whether the latter requests it or not. This follows from the fact that the deposit contract is not binding, and thus the deposit's return terminates the contract.
2. Death of the depositor or the depositary terminates the contract, since they are the only two parties to the contract.
3. If either depositor or depositary falls into a long-term coma or becomes insane for an extended period of time, he would lose his eligibility to continue the contract, and it is thus terminated.
4. If legal restrictions (*hajr*) are imposed on the depositor (due to mental incompetence) or on the depositary (due to bankruptcy), the contract is terminated to protect the benefits of the concerned parties.
5. If the depositor transfers ownership of the deposit to another (through a sale or gift, etc.), the deposit contract is terminated.

Part XI

Simple Loans (*aqd* al-*i'arah*)

Preliminaries

We shall study the simple loan contract in six chapters:

1. Definition and legality.
2. Cornerstones and conditions.
3. Legal status.
4. Characterization of the possession of a loaned item (*al-^cāriyyah*) in terms of trust and guaranty.
5. Disputes between the lender and borrower.
6. Termination of the contract.

Chapter 46

Definition and Legality

The object of a simple loan is called in Arabic *al-^cāriyyah*, and the simple loan contract is interchangeably called *^caqd al-^ci^cārah* or *^caqd al-^cāriyyah*. The etymology of the term may be derived from the term “^cāra”, in reference to the fact that the object of a simple loan “goes to another, and comes back”. Another explanation refers the term to “*al-ta^cāwur*”, which means taking turns. A third opinion was stated by Al-Jawharī, who argued that it is derived from the Arabic word “^cār”, meaning shame, since some consider it shameful to ask to borrow another’s property. However, the last view was rejected since the Prophet (pbuh) borrowed items and returned them, and he (pbuh) would never do anything shameful.¹

There are two main definitions of the simple loan contract:

- Al-Sarakhsī and the Mālikīs defined the simple loan contract as transfer of ownership of usufruct without a compensation. They also said that the name is derived from “*ta^criya*” (stripping off), since the contract is devoid of compensation.²
- On the other hand, the Shāfi‘īs and Ḥanbalīs defined simple loans as a permission of deriving usufruct from one’s property, without a compensation.³

The first definition renders the simple loan a contract that provides ownership rights to the borrower, and hence empowers the borrower to re-lend what he borrowed, since the usufruct is his property to deal in as he wishes. In contrast, the second definition is more restrictive, whereby the borrower only has the permission to use the lent object, and hence has no right to re-lend it or lease it to another. On the other hand, both contracts agree on the restriction of

¹Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.263), ’Ibn Al-Humām ((Hanafī), vol.7, p.99), ’Ibn ^cĀbidin ((Hanafī), vol.4, p.524).

²Al-Sarakhsī (1st edition (Hanafī), vol.11, p.133), ’Ibn Juzayy ((Mālikī), p.373).

³Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.264), Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.67).

the contract to usufruct of the lent property. This restriction is the difference between a simple loan and a gift, since the latter pertains to the property itself.

Simple loans are recommended charitable contracts that bring Muslims closer to Allāh. Proof of this fact is provided in the verse: “Help one another in righteousness and piety” [5:2]. Moreover, some exegetes interpreted the verse admonishing those who “refuse to supply neighborly needs” [107:7] to refer to “neighborly needs” to borrow properties from one’s neighbor.⁴ Moreover, proof is provided by the *Hadīth* narrated in Al-Bukhārī and Muslim that the Prophet (pbuh) borrowed a horse from ’Abū Talhah, and rode it.⁵ There is also a narration in ’Abū Dāwūd based on a good chain of narrators that the Prophet (pbuh) borrowed a shield from Ṣafwān ibn ’Umayyah on the day of Hunayn. The latter asked: “Will you usurp it, O Muḥammad?”, and the Prophet (pbuh) said: “No, it is a guaranteed loan”.⁶

⁴Al-Khaṭīb Al-Shirbīnī ((Shāfi’ī), *ibid.*), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi’ī), vol.1, p.392), ’Ibn Qudāmah (, vol.5, p.203).

⁵Narrated by ’Alīmad, Al-Bukhārī and Muslim on the authority of ’Anas ibn Mālik, that there was fear in Madīnah, so the Prophet (pbuh) borrowed a horse named Al-Mandūb from ’Abū Talhah, and rode it. He (pbuh) returned later, and said, “I saw nothing to worry about”, and commented “and this horse was fast”, c.f. Al-Shawkānī (, vol.5, p.299).

⁶Narrated by ’Abū Dāwūd, Al-Nasā’ī, ’Alīmad, and Al-Ḥākim (who validated it) on the authority of Ṣafwān ibn ’Umayyah that the Prophet (pbuh) borrowed a number of shields from him on the day of Hunayn, and that he asked him “Will you usurp them, O Muḥammad?”, but the Prophet (pbuh) said: “No, they are a guaranteed loan”. Then, he said, some of the shields were lost, and the Prophet (pbuh) offered to compensate him for them, at which time Ṣafwān said that he wanted to accept Islām. Al-Ḥākim’s narration indicated that the number of shields was one hundred, while ’Ibn Dāwūd’s narration indicated that the number was between thirty and forty. There is another valid narration on the authority of ’Ibn ’Abbās, in which the Prophet (pbuh) said: “No, they are a loan to be returned”. Other narrations exist in Al-Dāraqutnī and Al-Bayhaqī, on the authority of ’Ishāq ibn ’Abdul-Wāhid, whose narrations are not accepted. Also, ’Abū Dāwūd and Al-Nasā’ī have other reports of the *Hadīth* with incomplete chains of narration. For references, c.f. ’Ibn Al-’Athīr Al-Jazārī (, vol.9, p.109), Al-Ḥāfiẓ Al-Zaylānī (1st edition, (*Hadīth*), vol.4, p.116), ’Ibn Ḥajar (, p.252), Al-Shawkānī (, vol.5, p.299), Al-Ṣan‘ānī (2nd printing, vol.3, p.69). The difference between the two expressions “guaranteed” (*madmūnah*) and “to be returned” (*mardūdah*) used in the different narrations is significant. The first term indicates that if the guaranteed items were to perish, the owner must be compensated by its value. On the other hand, items “to be returned” must be returned if they continue to exist, but their value is not guaranteed if they were to perish.

Chapter 47

Cornerstones and Conditions

The majority of Ḥanafīs stipulated that there was only one cornerstone for the simple loan contract: sic. the lender's offer. While reasoning by analogy (as Zufar did) to gifts would dictate making acceptance a cornerstones as well, most of the Ḥanafīs reasoned by juristic approbation that it is not a cornerstone. As we have seen in our discussion of the gift contract, this leads to different rulings in the case where a person takes an oath never to lend a particular other person, and then proceeds to lend him. In this case, the majority of Ḥanafīs do not consider that he broke his oath, while Zufar considers that he did.

On the other hand, the non-Ḥanafi jurists enumerated four cornerstones for a simple loan contract. Those four cornerstones are: (i) lender, (ii) borrower, (iii) loaned item, and (iv) contract language. In this regard, the contract language consists of any words or actions that indicate giving the usufruct of the lent item as a gift.

The Ḥanafīs did not require necessarily that the term for "simple loan" be used in the offer. Thus, they consider any offer that implies granting the other person usufruct of one's property without compensation to be a simple loan offer.¹ In contrast, most of the Shāfi'īs insisted that either the offer or the acceptance must use the term "loaned", since using the property of another requires his explicit permission.²

Jurists stipulated three main conditions for the simple loan contract:

1. The lender must be eligible to lend his property. For the Ḥanafīs, this meant that the lender must be sane and discerning, but not necessarily of legal age.

The other jurists stipulated that eligibility to make a simple loan requires free will and eligibility to make charitable contributions. Thus, in addition

¹Al-Kāsānī ((Hanafi), vol.6, p.214).

²Al-Khatīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.266).

to disallowing gifts given by coerced individuals, they require that the lender satisfies sanity, being of legal age, and discernment.³

2. The lender must accept the simple loan for the contract to be concluded. This follows since a simple loan is a voluntary charitable contract, and thus it requires receipt, in analogy to gifts.
3. The loaned object must be possible to use without consumption, otherwise it cannot be loaned.⁴

All jurists agree that items that remain intact while usufruct is derived from them (e.g. homes, clothes, riding animals, etc.) are eligible for being lent. Thus, an item can be the object of a simple loan if it is: (i) not consumed by utilization, (ii) identifiable, and (iii) its usufruct is permissible in Islām.⁵

³ibid.

⁴Al-Kāsānī ((Hānafi), ibid.).

⁵'Abū-'Ishāq Al-Shirāzī ((Shāfi'i), vol.1, p.363), 'Ibn Juzayy ((Mālikī), p.373), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.266).

Chapter 48

Legal Status

In this chapter, we shall study the legal status of simple loan contracts in two sections:

1. The actual legal status.
2. Characterization of the legal status.

48.1 The actual legal status

The term “simple loan” (*'iṣārah*) is sometimes used metaphorically to mean a “loan” (*qard*). Fungibles measured by weight, volume, or numbers of homogeneous goods (e.g. gold coins, dates, wheat, eggs, etc.) do not produce any usufruct except by consumption. If such items are lent, the borrower is required to repay an equivalent (e.g. an equal measure of wheat to that he borrowed), or the value of what he borrowed. Thus, such contracts are not eligible for simple loans, since the same lent item is never returned. Even if the term (*'iṣārah*) is used metaphorically for lending such items, the contract is treated by jurists as a (*qard*), whether the contract stated that the borrower owned the usufruct, or was permitted to derive usufruct from the lent object.¹

In what follows, we are concerned with the legal status of an actual “simple loan” contract, whereby the usufruct of an identifiable non-fungible is given to another, and the item itself remains intact. There are two main rulings on the legal status of this contract:

- The Mālikīs and most of the Hanafis ruled that the contract establishes the borrower’s ownership of the lent item’s usufruct (and all other rights commonly associated with the usufruct) without any compensation.²

¹ Al-Kāsānī ((Hanafi), vol.6, p.215), Al-Sarakhsī (1st edition (Hanafi), vol.11, p.145), 'Ibn Al-Humām ((Hanafi), vol.7, p.108), *Majma' Al-Damānāt* (p.55), ^cAbd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.203).

² Al-Sarakhsī (1st edition (Hanafi), vol.11, p.133), Al-Kāsānī ((Hanafi), vol.6, p.214), 'Ibn Al-Humām ((Hanafi), vol.7, pp.98,106), 'Ibn ^cAbidīn ((Hanafi), vol.4, p.524), *Hāshiyat Al-Dusūqī* (vol.3, p.433).

- Al-Karkhī, the Shāfi‘īs and the Ḥanbalīs ruled that the contract establishes a permission for the borrower to use the lent item. Thus, they ruled that it is a permission contract, and not one that establishes ownership.³

As we stated in earlier chapters, this distinction between ownership of the usufruct (as ruled by the first group) and permission to derive it (as ruled by the second group) has consequences on the borrower rights of dealing with the lent item. Thus, the first group ruled that the borrower may re-lend the borrowed object to another, with or without the owner’s permission, provided that the object’s usage does not depend on its user. The Ḥanafīs justified this ruling by arguing that ownership of usufruct gives the owner all the rights the owner of a physical object has regarding this object, including allowing others to use his “property”. However, the Mālikīs protected the lender by disallowing the borrower from re-lending the item if the lender forbade him from doing that.

As we have seen also, the second group of jurists argued that the contract only gave the borrower a permission to use the lent object, and the one who is given permission cannot extend that permission to another. For instance, a guest who is given permission to eat at one’s table may not give permission to another person to eat that food. Moreover, they argued on legal grounds based on the fact that all jurists permit simple loans without an expiration date. In this regard, they argued that had the contract resulted in ownership of the usufruct, it would be necessary to specify the term of the contract, in analogy to leases.

On the other hand, all jurists from both groups agreed that the borrower does not have the right to lease what he borrowed. This follows directly for the second group, who ruled that the borrower does not own the usufruct, and thus cannot sell it. For the first group, the ruling was based on legal reasoning from the binding nature of lease contracts. Since the simple loan is a voluntary charitable contract, none of its consequences can be used to support a binding contract. Similarly, both groups agreed that the borrower is not allowed to pawn what he borrowed, since his rights under the simple loans pertain only to the usufruct and not to the lent item itself.⁴

48.1.1 Usufruct rights

The non-Ḥanafī jurists ruled that limits to the borrower’s derivation of usufruct from the lent object are dictated by the lender’s conditions and permission. On the other hand, the Ḥanafīs distinguished in this regard between restricted and unrestricted simple loans:

- An unrestricted simple loan contract would not specify the identities of authorized users of the property, and the permitted means of using it. In this case, the Ḥanafīs argued that the borrower would have all the rights

³Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī)), vol.2, p.264), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī)), vol.1, p.364), ’Ibn Qudāmah (, vol.5, p.209).

⁴As we have seen, a deposit may not be leased, pawned, re-deposited, or lent, c.f. ’Ibn c-Ābidīn ((Hanafi)), vol.4, p.525).

of the owner. Thus, any normal usage of the property would be deemed permissible for the borrower. However, if the borrower abuses the lent property in a manner that causes a defect or a loss, he must guarantee it. Thus, an unrestricted contract is considered to be implicitly restricted by convention, as we have seen in the lease contract.⁵

- A restricted simple loan may include restrictions in terms of the duration of usage, the type of usage, or both. In such contracts, the Hanafis ruled that the borrower should abide by the stipulated restrictions as much as possible. However, if a restriction that does not have any benefit to the owner pauses unnecessary difficulties to the borrower, the restriction is considered nugatory.⁶ In what follows, we discuss some of the common restrictions in some detail:
 - If the owner restricts the borrower not to allow anyone else to use the lent object, then the ruling depends on whether or not the object's usage varies from one user to another:
 - * If the usage does vary with the user (e.g. riding an animal, wearing clothes), then the borrower should honor this restriction.
 - * If the usage does not vary with the user (e.g. living in a house), then the borrower is permitted to let another reside in the house, despite the lender's restriction. Thus, if the borrower was considering allowing a blacksmith to live in the house and possibly cause some damage, then he should abide by the lender's restriction. However, if he was considering allowing a person live in the house in a manner similar to his own residence, then the restriction is of no use to the lender, and the borrower may ignore the restriction. In this regard, what is restricted is any tenant that has a negative effect that is conventionally restricted, and the explicit restriction of the lender plays no role.
 - Any temporal or spatial restriction must be observed, since such restrictions are beneficial for the lender. Thus, if the borrower transgresses against such restrictions, he must guarantee the lent object.
 - If the lent object was a transportation vehicle, and the lender restricted the amount or genus of the load, we need to consider different cases:
 - * If the borrower put a larger load on the transportation vehicle, he must guarantee it. For instance, if two individuals rode on it instead of one, and the vehicle could bear them both, then he guarantees half of its value if it becomes defective. In this case,

⁵ Al-Sarakhsī (1st edition (Hanafi), vol.11, p.144), Al-Kāsānī ((Hanafi), ibid.), 'Ibn Al-Humām ((Hanafi), vol.7, p.107), 'Ibn 'Abidīn ((Hanafi), vol.4, p.527), *Majma' Al-Damānāt* (p.57 onwards).

⁶ Al-Kāsānī ((Hanafi), vol.6, pp.215-216), 'Ibn Al-Humām ((Hanafi), vol.7, p.107 onwards), 'Ibn 'Abidīn ((Hanafi), vol.4, p.527), Al-Sarakhsī (1st edition (Hanafi), vol.11, p.137 onwards), *Majma' Al-Damānāt* (p.60 onwards).

he would only have transgressed the restriction in that one half of the load. However, if the vehicle could not have borne them both, he must guarantee its full value, since he would thus have destroyed it.

- * If he transports a load of different genus than what was stipulated in the contract, then he guarantees the vehicle if and only if the load was heavier than what was stipulated. However, the difference in the load's genus may affect the vehicle independently of the weight (e.g. if it is denser, and distributes the weight differently). In such cases, the borrower must guarantee the vehicle if he loaded it goods of such restricted genera, even if the weight was the same as stipulated in the contract.
- * If he loads the vehicle with heavier goods of the specified genus, then he guarantees the vehicle in proportion to the increased weight. However, if the genus was different and the weight was heavier, he must guarantee the entire value of the vehicle.

In this regard, if the lender and borrower disagree over the stipulated restrictions (be they temporal, qualitative, or quantitative), the lender's claim is accepted.⁷ This ruling is based on the view that the lender gave the borrower the permission to use his property, and thus he is entitled to specify the limits of such permitted usage. In this regard, if they disagree, the borrower is considered to be making a claim that he had more usage rights, while the lender is denying that claim. Thus, the lender's claim (as a denier) is given priority over the borrower's.

48.2 Characterization of the legal status

The Hanafis, Shafis, and Hanbalis ruled that the ownership of usufruct that is established for the borrower is not binding, since it is not compensated (in analogy to gifts). Proof for the ruling that simple loans are a permissible but non-binding contract is based on the *Hadith*: "Gifts may be returned or recalled, and simple loans must be returned".⁸

Thus, under normal circumstances, the lender has the right to recall the lent item at any time, and the borrower has the right to return it at any time, whether the simple loan was restricted or unrestricted. A few exceptions exist, however, where early return or lent items may cause losses for the owner, or

⁷Al-Sarakhsî (1st edition (Hanafi), vol.11, p.143).

⁸Narrated by 'Abū Dāwid, 'Ahmad, 'Abū Ya'clâ, Al-Dâraqutnî, 'Ibn 'Abî Shaybah, ^cAbdul-Razzâq, Al-Tirmidhî (who classified it as a *Hadîth hasan*) and 'Ibn Hîbbân (who validated it) on the authority of 'Abû 'Umâmah as follows: "A simple loan is returned, a gift may be returned, a debt must be repaid, and a transgressor must guarantee the object [in all of those contracts]". Al-Tabarânî narrated a similar *Hadith* in *Musnad Al-Shâmiyîn* on the authority of 'Anas, and 'Ibn ^cAdiyy also narrated a similar *Hadîth* in his *Al-Kâmil* on the authority of 'Ibn ^cAbbâs. c.f. Al-Hâfiż Al-Zayla'î (1st edition, (Hadîth), vol.4, p.57), 'Ibn Hajar (, p.250), 'Ibn Al-'Athîr Al-Jazârî (, vol.9, p.110).

in special cases where the simple loan is binding. An example of a mutually binding simple loan is the case where a person lends another land to bury a dead person.⁹ Another example is the case where a person lends the other a house to live in for a specific time period, in which case he cannot rescind the loan during that period.

On the other hand, most of the Mālikīs ruled that a lender may not recall the object of a simple loan prior to its usage. In this regard, even though no term of the loan was specified, the contract still has an implicit term that is dictated by convention. However, Al-Dardir ((Mālikī)A) ruled that the lender may recall the object of an unrestricted simple loan at any time.¹⁰ Those two opinions may be reconciled if we say that the Mālikīs permitted recalls of objects of unrestricted simple loans, but forbade it for ones that are restricted either explicitly, or implicitly (by convention).

48.3 Recall of lent land

The reason for the reported differences in opinion among the juristic schools illustrates the different degrees of bindingness they commission to the simple loan contract. We shall highlight those differences further by considering an example in some detail. The example we consider in the remainder of this chapter is the case where the object of a simple loan is land intended for construction or planting. In this case, jurists expressed many different opinions about the permissibility of recalling the lent land:

- The Hanafis ruled that the owner is allowed to recall the land at any time if the simple loan was unrestricted, since the loan contract is not binding. If the owner recalls the land, the borrower must clear it of any building or plants, since keeping them can be costly for the owner. In this case, the lender does not guarantee any of the borrower's buildings or plants, and he bears no responsibility for them. This follows since the lender never deceived the borrower, even though the borrower deceived himself by not recognizing that the land may be recalled at anytime.

If the loan had a specified term, the Hanafis still maintain that the lender has the right to recall the land, based on the previously cited *Hadīth*. However, they consider recalling the land prior to the expiration of the loan term a reprehensible act of renegeing on a promise. In this case, the borrower is not required to remove his building or plants, and he has an option to ask the lender for compensation, or - if removing the building or plants does not affect the land adversely - to remove his building or plants. In this case, the lender is deemed to have deceived the borrower by specifying a term for the loan, and then recalling his property before

⁹ Al-Kāsānī ((Hanafī), vol.6, p.216), ^cAbd Al-Ghanī Al-Maydānī ((Hanafī), vol.2, p.202), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.270), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.262), ’Ibn Qudāmah (, vol.5, p.211), Al-Sharqawī ((Shāfi‘ī), p.166).

¹⁰ ’Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.308), *Hāshiyat Al-Dusūqī* (vol.3, p.439).

that term expired. On the other hand, if removing the building or plants would affect the land adversely, and the borrower wishes to remove them, then the lender has the option: either to allow the borrower to remove and take his property, or he may keep them and pay the borrower an appropriate compensation. This was the reported opinion in *Mukhtaṣar* of Al-Ḥākim Al-Shahīd. On the other hand, Al-Qaddūrī ruled that the lender must compensate the borrower for any losses caused by removing the building or plants, due to his deception.

On the other hand, if the simple loan contract explicitly stated that land was lent for growing a crop, then the land may not be recalled before the crop is collected. In this case, whether or not a term was explicitly stated for the loan, the crop-reaping time is well known. In this case, if the lender recalls the land, the crop may be kept in the land, and the borrower would have to pay the going market rental for similar land to preserve the rights of both the lender and the borrower. This ruling for growing crops is different from the case of growing other plants (e.g. trees), since the latter case does not have a natural termination date. Thus, the borrower would be forced to remove such plants to protect the owner's rights.¹¹

- The Mālikīs also ruled that the lender is generally permitted to recall the land if it was loaned in an unrestricted simple loan. However, they ruled that if a loan term was dictated by an explicit condition or by convention, then the lender may not recall the land before that date.

In such restricted loans, the lender may only recall the land if he pays the borrower a just compensation for his costs of building or planting. Then, after the termination of the conventional or conditioned loan period, the owner has the option of ordering the borrower to return the land to its initial state, or, if the additions were of any value after their removal, he may pay the borrower the value of those removed items less the cost of their removal.¹²

- The Shāfi‘īs and Ḥanbalīs ruled that the lender has the right to recall the land whether or not the simple loan did not have a specified term. In both cases, the borrower may continue to use the land until the lender recalls it. Then, when the lender recalls the land, if it contained buildings or plants, the borrower has to remove those additions if that was stipulated in the contract. If the borrower is required to remove those additions, he must also return the land to its initial form (e.g. if he removes added plants, he must also fill the resulting holes).

If the lender had not stipulated a condition that the borrower has to clear the land, then the borrower still has the option to remove the additions,

¹¹ Al-Kāsānī ((Hanafi), vol.6, p.217), 'Ibn Al-Humām ((Hanafi), vol.7, p.109), 'Ibn 'Abidin ((Hanafi), vol.4, p.527), Al-Sarakhsī (1st edition (Hanafi), vol.11, p.141), 'Abd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.203).

¹² 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.309), *Hāshiyat Al-Dusūqī* (vol.3, p.439), 'Ibn Juzayy ((Mālikī), p.373).

but the lender is not responsible to compensate him for any losses. In this case, the Shāfi‘īs and some of the Ḥanbalīs argue that the borrower would have to return the land to its initial condition. In this case, they argued, the borrower voluntarily removed the additions, and thus he must return it to the lender in a normal shape, in analogy to the responsibility of any person who caused damage to another’s property. On the other hand, the Ḥanbalī jurist Al-Qādī, and the majority of Ḥanbalīs, ruled that the removal would thus be with the lender’s permission, and therefore the borrower need not return the land to its initial condition.

On the other hand, if the borrower is not required to remove the additions, and he chooses not to remove them, then the lender has an option. He may thus choose to keep the addition and pay the borrower the going market rental rate for the additions, or he may remove the addition and compensate the borrower for the loss caused by removal.

The Shāfi‘īs and Ḥanbalīs also distinguished between land lent for growing a crop and land lent for other purposes. Thus, they ruled that if land was lent for agriculture, the lender may recall the land before planting. However, once the crop was planted, the lender may not recall the land until reaping time. If he does recall the land before that time, then the borrower must pay him the going market rental for the remaining period until he reaps his crop.¹³

In summary, the Hanafīs, Shāfi‘īs, and Ḥanbalīs ruled that the lender may recall land used for building or planting, whether or not the simple loan is restricted. If the land is lent for agriculture, the lender must wait until reaping time, and the most he can demand in the meantime is the land’s rent for the period between his recall of the land and reaping time. In contrast, the Mālikīs ruled that the lender may recall the land at anytime if the simple loan is unconstrained. However, they ruled that the lender does not have the right to recall the land in temporally constrained simple loans.

¹³: Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.364), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, pp.271-273), Ibn Qudāmah (, vol.5, p.212).

Chapter 49

Guarantees of Simple Loans

The Ḥanafīs ruled that the object of a simple loan is held by the borrower as a trust, whether or not he uses it. Thus, in analogy to the lessor and depositary, the borrower in a simple loan only guarantees the lent object against defects or perishing caused by his negligence or transgression. In the absence of such negligence or transgression, the borrower is considered a keeper of the lender's property, which is a good act, and Allāh (swt) said: "Is there any reward for good other than good?" [55:60].¹

The Mālikīs ruled that the lender guarantees lent objects that are not easily observable at all times (e.g. clothes, jewelry, and means of transportation), but do not guarantee easily observable objects (e.g. a house). In both cases, the borrower does not guarantee the borrowed object if he can prove that the negative effect was not caused by his negligence or transgression. The proof of this view is based on combining two *Hadīths*. The first *Hadīth* is the one quoted previously on the authority of Ṣafwān ibn 'Umayyah, where he was quoted to say: "No, it is a simple loan to be repaid" or "no, it is a simple loan to be returned". The second *Hadīth* was also quoted previously stating that "the non-transgressing borrower or depositary does not guarantee the objects of such contracts". They argued that the first *Hadīth* applied guaranty to lent items that were not observed by the lender, and the second *Hadīth* stated that no guaranty is established for observable lent items. In this regard, the Mālikī view is partially similar to the Ḥanafī view that simple loans are trust contracts.²

Most of the Shāfi'īs ruled that the borrower is required to guarantee the value of the lent item if it is destroyed or adversely affected due to unauthorized

¹ Al-Sarakhsī (1st edition (Hanafī), vol.11, p.135), Al-Kāsānī ((Hanafī), vol.6, p.217), 'Ibn Al-Humām ((Hanafī), vol.7, p.103), *Majma' Al-Damānāt* (p.55), ^cAbd Al-Ghanī Al-Maydānī ((Hanafī), vol.2, p.202).

²The Mālikī legal status of the object of a simple loan can be summarized in four points: (1) guaranty, (2) the borrower's usage is restricted by the lender's conditions, (3) bindingness on the lender if a specified time, distance, or amount is explicitly specified, whereby the lender cannot recall the lent item before then, (4) if the borrower claims that it was a simple loan, but the owner claims that it was a lease, then the latter's claim is accepted if supported by his oath, c.f. 'Ibn Juzayy ((Mālikī), p.373).

usage. Al-Nawawī said in *Al-Minhāj* that the Shāfi‘īs established this guaranty even if the unauthorized usage was not excessive, based on the *Hadīth* of Ṣafwān: “No, it is a guaranteed simple loan”. Moreover, legal analysis shows that the lent property should be returned to its owner, and thus its guaranty is determined on the same grounds as received goods in an unfinished sale. The compensation in this case is determined by the value of the item on the day it was adversely affected, and not the maximum value it had or its value on the day it was received.

On the other hand, if the borrower only used the lent item according to the lender’s permission, then the Shāfi‘īs ruled that he is not responsible for any losses that are not caused by his own negligence or transgression.³ Thus, whether the lent object is affected because of the authorized usage, or due to exogenous natural causes, the borrower does not guarantee it.⁴

Most of the Ḥanbalīs ruled that the object of a simple loan is always guaranteed by the borrower against any adverse effects, even those not caused by his transgression. In case of incidence of a defect or perishing of the item, they ruled that compensation is determined by the item’s value on the day the defect occurred. Their proof was also based on the previously cited *Hadīth* of Ṣafwān, which was narrated by ’Aḥmad and ’Abū Dāwūd on the authority of ’Ibn ‘Abbās and ’Abū Hurayrah, which stated: “No, it is a guaranteed simple loan”.⁵ They also provided proof for their ruling of guaranty based on the *Hadīth*: “Every recipient is responsible for what he took until he returns it”.⁶ They also reasoned legally that, unlike a pawned object taken for guaranty, the borrowed item is another’s property taken to derive benefits, without deserving it or authorization to consume the object, and thus he must guarantee it in analogy to the usurper. However, the Ḥanbalīs made an exception for a person who borrowed religious books or religiously endowed weapons, whereby he only guarantees them if he is negligent or transgressing.

In summary, the Shāfi‘īs and Ḥanbalīs consider the borrower a guarantor, while the Ḥanafīs and Mālikīs consider him a trustee. All jurists agree that

³ Al-Baghdādī said in *Majma‘ Al-Damānāt* (p.55): “The difference in rulings between the Ḥanafīs and Shāfi‘īs applies to the case where the lent object is not being used. However, if it is adversely affected during usage, all jurists agree that the borrower does not guarantee it [if he was neither negligent nor transgressing]”.

⁴ Al-’Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.14, p.204 onwards), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.363), Al-Khaṭīb Al-Shirbīni ((Shāfi‘ī), vol.2, pp.267,274), Al-Suyūṭī ((Shāfi‘ī), p.150), *Al-’Iqnā‘* and Al-Khaṭīb Al-Shirbīni ((Shāfi‘ī), vol.3, pp.136,139), main text by ’Abū Shujā‘ with *Hāshiyat Al-Bājūrī* (vol.2, p.10), Al-Sharqāwī ((Shāfi‘ī), p.166), ’Abū-Bakr Al-Hisnī (4th printing (Shāfi‘ī), vol.1, p.555).

⁵ Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.76), ’Ibn Qudāmah (, vol.5, p.203), ’Ibn Rajab (1st edition (Ḥanbalī), p.59).

⁶ Narrated by ’Aḥmad and the four authors of the *Sunan*, and rendered valid by Al-Ḥākim, on the authority of Samurah ibn Jundub that the Prophet (pbuh) said: “Every recipient is responsible for what he took until he returns it”. ’Abū Dāwūd and Al-Tirmidhī said that Qutādah said that Al-Ḥasan had forgotten the remainder of the *Hadīth*: “... but in simple loans, he is a trustee who does not guarantee the item”. The *Hadīth* was also narrated by Al-Ṭabarānī, Al-Ḥākim, and ’Ibn ’Abī Shaybah, c.f. ’Ibn Al-’Athīr Al-Jazarī (, vol.9, p.110), Al-Ḥāfiẓ Al-Zaylānī (1st edition, (Hadīth), vol.4, p.167), ’Ibn Ḥajar (, p.253), Al-Sakhāwī (, p.290), Al-Shawkānī (, vol.5, p.298), Al-Ṣan‘ānī (2nd printing, vol.3, p.67).

the lender is exonerated of all guarantees by delivering the lent object to any customary recipient (e.g. the lender's wife, or a legal agent who commonly receives other's property).

49.1 Can the lender require guaranty?

The Ḥanafīs ruled that a lender's condition that the borrower must guarantee the loaned item is invalid. They considered type of condition to be contrary to the nature of the simple loan contract. Thus, like other conditions that contradict the nature of contracts (e.g. guaranty in deposit, or non-guaranty in pawning), the condition is rendered invalid.⁷

The Mālikīs ruled that if the lender stipulates a condition of guaranty in a case where guaranty is not required, the contract is deemed a defective lease rather than a simple loan. This ruling follows since the lender's condition of a guarantee in a simple loan is tantamount to an unknown compensation in a lease. Hence, a legal solution is devised by stipulating a known lease payment, determined by market conditions.⁸ Thus, the borrower in this case pays the going market rental rate for the lent item, and does not guarantee it except against his negligence and transgression.

Recall that the Shāfi‘īs and Ḥanbalīs ruled that the borrower guarantees the object of a simple loan in most cases. Then, they ruled that if the borrower were to stipulate a condition of non-guaranty, his condition is considered nugatory, and he still guarantees the object. This ruling is based on the general principle that guaranty cannot be removed by conditions in contracts that require guaranty (e.g. the guarantee of received objects in a valid or defective sale).⁹

49.2 Changes from trust to guaranty

For the Ḥanafīs, the same conditions that would change the possession of a deposit from trust to guaranty also apply to the possession of a simple loan. We list some of those conditions for completeness:

1. If the borrower wastes the borrowed item, destroys it physically (e.g. by showing a thief how to get to it), or denies to the lender when he has a right to recall it.
2. If the borrower abandons safekeeping the borrowed object, or if he leases it to another.
3. If the borrower uses the borrowed object in an unauthorized or unconventional manner.
4. If the borrower does not follow the lender's instructions for safekeeping.

⁷ Ibn ^cAbīdīn ((Ḥanafī), vol.4, pp.516,525), *Majma^c Al-Damānāt* (p.55).

⁸ Ḥāshiyat *Al-Dusūqī* (vol.3, p.436), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.309).

⁹ Ibn Qudāmah (, vol.5, p.204).

While those conditions for converting the possession of trust into a possession of guaranty are similar for deposits and simple loans, there are some significant differences between the two contracts in this regard:

1. If the borrower in a simple loan contract takes actions that convert his possession into a possession of guaranty, and then reverts to abiding by all the conditions, the guarantee remains in place. This is different from the case of deposits, where removal of the reason for guaranty would absolve the depositary. The reason for the difference is that the purpose of the deposit contract is safekeeping of the deposit. Thus, removal of the factors that effect guaranty reverts the contract to its original form. However, the purpose of the loan contract is use of the loaned item, and violation of the nature of that contract effects a guaranty condition irrevocably.
2. If the borrower returns the borrowed item to the lender's home, he is absolved of his guarantee for the loaned object. This is in contrast to the return of a deposit or a usurped object, where the item must be given to the owner, in accordance with the verse: "Allāh commands you to return trusts to those to whom they are due" [4:58]. However, it is customary in simple loans to return the loaned item to the owner's home or give it to his dependants, and thus simple loans are excluded from the requirement derived from this verse.
- On the other hand, if the borrowed item was valuable, and the borrower returned it to the lender's house, but did not give it to him personally, then he must guarantee the item. This ruling is also based on conventional behavior, whereby valuable assets are returned to their owners.
3. We have seen previously that if the depositor and depositary disagree, the depositary's claim is usually accepted. In simple loans, the rule is reversed, thus accepting the lender's claim in most cases.¹⁰

49.3 Cost of re-delivery

Since returning the borrowed items is the borrower's responsibility, jurists ruled that he must thus bear the cost of delivery. This responsibility follows from the fact that the borrower receives the loaned item for his own benefit, thus he must also bear the cost of returning it. Thus, this ruling is identical to the case of usurped objects, where the usurper bears the responsibility of returning the usurped object to its owner, and thus bears the cost of delivery.

This is in contrast to the ruling in leases, where the cost of re-delivery of leased objects is borne by the lessor. This follows since the lessee is only responsible to give the lessor access to the leased object at the conclusion of the lease, but he is not responsible to deliver it.¹¹ The main difference between the

¹⁰ Al-Kāsānī ((Hanafī), ibid., p.211 onwards), *Majma' Al-Damānāt* (p.57).

¹¹ c'Abd Al-Ghanī Al-Maydānī ((Hanafī), vol.2, p.204), 'Ibn 'Ābidīn ((Hanafī), vol.4, p.527 onwards).

two cases is the fact that the lessor seeks his own benefit (by receiving rent), while the simple contract only provides benefits to the borrower.

Chapter 50

Lender-Borrower Disagreements

When disagreements occur between the lender and the borrower, the type of disagreement dictates the party whose claim is accepted. In what follows, we give some detailed discussion of the different circumstances that may arise:¹

50.1 Disagreements over the contract nature

If the two parties disagree over the nature of the contract, e.g. if the owner claims that the contract was a lease and the other party claims that it was a simple loan, the Shāfi‘is ruled that the owner’s claim is accepted if he supports it with an oath. The same ruling applies if the owner claimed that the object was usurped and the other party claimed that it was loaned to him. In all such cases, the default status of the object is impermissibility of usage by any party other than the owner. Thus, the owner is denying that he gave permission for the other party to use the object, and his claim (as a denier) is accepted if backed by his oath. Thus, if he does take the oath, his claim is accepted and he is entitled to collect the going market rental rate for his property.

50.2 Disagreement over causes of defect

If a borrowed item perishes or becomes defective, the borrower claims that he only used it in the authorized manner, and the owner claimed that the borrower was responsible for the defect, then all jurists agree that the borrower’s claim is accepted if he supports it with an oath. For the jurists who consider the borrower’s possession one of guaranty, they base this ruling on the difficulty of

¹ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.273 onwards), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.366 onwards), Ibn Qudāmah (, vol.5, pp.217-219), *Hashiyat Al-Ṣāwī ‘alā Al-Sharḥ Al-Saghīr* (vol.3, p.579).

providing a proof that he did not cause the defect by abusing the lent object. For the other jurists who consider the borrower's possession one of trust, the ruling follows immediately from the general principle that the trustee's claim is always accepted.

50.3 Disagreement over return

If the borrower claims that he has already returned the lent object, but the lender claims that the object was not returned, the lender's claim is accepted if he supports it with his oath. In this case, the ruling is that the default status of the object is not being returned. Thus the borrower is making a claim that he needs to support with a proof. The lender, on the other hand, is a denier of that claim, and hence his claim is accepted based on his oath.

Chapter 51

Termination of the contract

The simple loan contract is terminated if any of the following events takes place:

1. If the lender recalls the loan, the contract is voided and terminated. This follows from the non-binding nature of the simple loan contract.
2. If the borrower returns the lent object to the lender, the contract is voided and terminated at that time.
3. If either borrower or lender falls prey to long-term insanity or unconsciousness, the loan is terminated. This ruling follows from the termination of one party's eligibility to initiate or maintain the voluntarily charitable simple loan contract.
4. If either borrower or lender dies, the simple loan is terminated. This follows since the contract is based on permission of using the lender's property. Clearly, this basic tenet of the contract cannot be maintained in the absence of either the one giving the permission or the one who received that permission.
5. If either borrower or lender is put under legal restraint (*hajr*) due to mental incompetence, he would thus lose his eligibility for the contract, and it is voided and terminated.
6. If the owner-lender is put under legal restraint due to declaring bankruptcy, the simple loan contract must be terminated to protect the interests of his creditors.

Part XII

The Agency Contract (*qaqd al-wakālah*)

Preliminaries

The agency contract will be studied in six chapters:

1. Definition, cornerstones, and legality.
2. Contract conditions.
3. Legal status.
4. Multiple legal agents.
5. Termination of the contract.

Chapter 52

Definition, Cornerstones, and Legality

52.1 Definition

The term *wakālah* or *wikālah* literally means “preservation”. For instance, in verse [3:173]: “They said: ‘for us, Allāh suffices, and He is the best Disposer of affairs [the best *wakil*]’. The Prophet (pbuh) was also urged in [73:9] to take Allāh (swt), the only true God, as his preserver and protector (*wakil*), as explained by Al-Farrā’.

The term is also used to mean delegation of one’s affairs to another. Thus, Allāh is also described as the best one to whom one must delegate one’s affairs: “For those who put their trust [*mutawakkilūn*] should put their trust on Allāh” [14:12]. Also, the Prophet Hūd (pbuh) said to his people: “I put my trust [*tawakkaltu*] in Allāh, my Lord, and your Lord” [11:56].

The Hanafis defined *wakālah* legally as the delegation of one person (the principal) for another (the agent) to take his place in a known and permissible dealing.¹ In this regard, the *wakil* (agent) deals in the other’s property and preserves it. On the other hand, Shāfi‘is postulated the following more restrictive definition for *wakālah*: It is the delegation of one living person to another of the performance of an act that permits delegation, and that the first person is permitted to perform himself.² In this regard, they stipulated that the delegating party must be living to distinguish the agency contract from a person’s will. Dealings that are permissible for agency contracts include financial dealings such as trading, as well as many other actions that allow for legal representation (e.g. giving permission for entry into a property).

¹Ibn Al-Humām ((Hanafi), vol.6, p.3), Al-Kāsānī ((Hanafi), vol.6, p.19), 'Ibn 'Abidīn ((Hanafi), vol.3, p.417), Al-Zayla'i ((Hanafi Jurisprudence), vol.4, p.254).

²Al-Khatib Al-Shirbīnī ((Shāfi'i), vol.2, p.217).

52.2 Cornerstones

The Ḥanafīs stipulated valid offer and acceptance (e.g. if the principal says “I have commissioned you as an agent for such and such”, and the agent says “I accept”) as cornerstones of the agency contract.³ While the Ḥanafīs restricted the contract’s cornerstones to offer and acceptance or actions implying acceptance, the other jurists enumerate four cornerstones: (i) principal, (ii) agent, (iii) object of the agency contract, and (iv) the contract language.

Jurists agreed that it is not necessary for acceptance to be indicated verbally. This follows from the fact that delegation is a permission similar to permission to eat, and thus acceptance of the offer may be established through many different actions.⁴ Moreover, jurists agreed that acceptance may follow immediately after the offer, or it may be delayed. This ruling is based on the historical fact that some of the Prophet’s (pbuh) agents only accepted the agency after some time.

Thus, if the agency offer and acceptance were not established, the contract is not concluded. For instance, consider the case where one person offers another to be his agent in collecting a debt, but the second person refused. If the second person were then to proceed to collect the debt, the debtor is not relieved of his debt, since the agency contract was never concluded.

In this regard, both offer and acceptance need to be established for the contract to be concluded. Thus, the one making the offer may rescind it prior to its acceptance, in analogy to sales.

The Ḥanbalīs also permitted so called automatic or cyclic agency.⁵ In this contract, the principal says: “I have commissioned you as my agent, and if your agency is terminated for any reason, then I am automatically re-commissioning you as my agent”. Similarly, they permitted automatic termination of agency: “If I ever commission you as my agent, then I am stipulating that this agency will be automatically terminated upon commission”.

52.2.1 Restricted agency

The Ḥanafīs and Ḥanbalīs permitted unrestricted agency contracts, as well as agency contracts that are restricted by some condition. For instance, they allow a principal to stipulate that a second becomes his agent in selling a particular item if a named customer were to arrive. In this case, the agent is not permitted to deal in the owner’s property unless the condition is satisfied. The condition may also be temporal, e.g. permitting an agent to sell an item the next day, in which case the agency does not commence until the following day. The permissibility of such restricted agency contracts is based on the view that the contract results in a permission, which may be deferred or suspended pending a condition. This is one of the aspects in which the agency contract resembles a will.⁶

³ Al-Kāsānī ((Hanafi), ibid., p.20).

⁴ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.222), ’Ibn Qudāmah (, vol.5, p.84).

⁵ Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.156).

⁶ Al-Kāsānī ((Hanafi), vol.6, p.20), Mar‘ī ibn Yūsuf (1st printing (Hanbalī), vol.2, p.147).

On the other hand, most Shāfi‘īs accept the opinion of their ‘Imām that agency contracts may not be deferred or suspended pending a condition. However, he permitted the first party to make the agency unrestricted, but to stipulate a condition that the agent does not act for sometime. Al-Shāfi‘ī’s proof was the view that ignorance (*jahālah*) invalidates the legal agency contract, and thus deferment and suspension on a condition are not allowed in analogy to sales and leases. In this regard, he distinguished between the will contract and the agency contract, since the (*gharar*) caused by deferment or suspension on a condition does not affect the former, whereas it affects the latter.

In this case, the Shāfi‘īs ruled that if an agent acts according to such a deferred or suspended agency contract, his actions are valid, despite the defectiveness of the agency contract. The defectiveness of the contract implies that any promised wage in the agency contract must be dropped, and his work should be compensated by the going market wage for that work. This ruling is made in analogy to the proper manner of compensating a hired worker in a defective hiring contract.⁷

In contrast, if the agency contract is concluded, but the actual action is suspended pending a condition, jurists agree that the agency contract is valid. For instance, the principal may say “I have commissioned you as an agent to buy this item, but buy it only after the first of the month”.

52.2.2 Temporary agency

Jurists agreed that the agency contract may specify a termination date. This follows from the fact that agency is permitted to meet specific needs, and such needs may be temporary.

52.2.3 Compensated agency

The agency contract can be valid with or without the agent being paid a wage. This follows from the fact that the Prophet (pbuh) paid his agents for the collection of charities.⁸ Indeed, that is the reason that the Prophet’s (pbuh) cousins asked him to send them to collect those charities, promising that they would deliver the same amounts as his other agents, and looking forward to receiving the commissions that such charity collectors were paid.

⁷ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.223), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.350).

⁸ Ibn Hajar said that this is a well known *Hadīth*. For it is narrated in Al-Bukhārī and Muslim on the authority of ’Abū Hurayrah (mAbpwh) that the Prophet (pbuh) sent agents to collect charities. They also narrated on the authority of ’Abū Ḥumayd Al-Sā‘idī that the Prophet (pbuh) used a man from Al-Azd named ’Ibn Al-Lutaybah. They also narrated on the authority of ’Umar that he (pbuh) used ’Ibn Al-Sa‘diy. Also, ’Abū Dāwūd narrated that the Prophet (pbuh) sent ’Abū Mas‘ūd to collect charities, and ’Ahmad narrated in his *Musnad* that he (pbuh) sent ’Abū Jahl ibn Hudhayfah as a collector of charities, and another narration on the authority of Qurrah ibn Da‘mūṣ that he (pbuh) sent Al-Dahhāk ibn Qays. It was also narrated in *Al-Mustadrak* that the Prophet (pbuh) sent Qays ibn Sa‘d, sent ’Ubādah ibn Al-Ṣāmit, and sent Al-Walīd ibn Uqbah as agents for the collection of charities, c.f. ’Ibn Hajar (, pp.176,251,275).

Moreover, the agency contract is a permissible contract in which the agent is not required to perform the specified task. Thus, he may collect a wage for performing the task. This is in contrast to witness – whose testifying obligation is a religious and legal requirement – who thus may not be paid a wage.

Thus, agency without wages is a form of charity from the agent. On the other hand, agency with compensation (*ju‘l*) inherits the legal status of hiring contracts. Thus, if the agency involves delivering an item to the principal, the agent is entitled to his compensation upon delivering the object. If the agency involves trading or performing a pilgrimage, the agent is entitled to his compensation as soon as the task is performed. Thus, if an agent sells an item on behalf of the principal, he is entitled to his wages even if he had not yet collected the price.⁹

In an agency contract where the agent is entitled to a wage, the principal may stipulate a condition that the agent does not terminate the agency before a specified date. In this case, if the agent terminates the agency before the stated date, the principal will not be required to pay any compensation to the agent.

52.2.4 Comprehensive agency

The Hanafīs and Mālikīs permitted comprehensive agency, or “power of attorney”, whereby the agent is permitted to take all legal actions of the principal that may be delegated to another.¹⁰ Their ruling is based on the fact that agency is permitted for each of those actions individually, and thus a general power of attorney, or a comprehensive agency, is also permitted. On the other hand, the Shāfi‘is and the Ḥanbalīs argued that such powers of attorney lead to massive uncertainty (*gharar*), and thus forbade the practice. This difference in opinion pertains to agencies that are completely unrestricted. However, all jurists are in agreement regarding the legality of restricted agency.

52.3 Legality

Agency contracts are permissible, with proofs available in the Qur’ān, the Sunnah, and consensus of the scholars:

- Proofs are found in a number of verses in the Qur’ān. For instance, an example of agency in purchasing foodstuffs is found in [18:19]: “Now send one of you with this money to the town; let him find out which is the best food and bring some to you”. There are many other verses that specify a variety of permissible agencies: “Commission two arbiters, one [representative] from his family and one [representative] from hers” [4:35], “Go with my shirt...” [12:93], “set me over the storehouses ...” [12:55], and “Alms are for the poor and the needy and those employed to administer the funds...” [9:60].

⁹Ibn Qudāmah (, vol.5, p.85 onwards), 'Ibn Al-Humām ((Hanafi), vol.6, p.2), 'Ibn Juzayy ((Mālikī), p.329).

¹⁰Ibn 'Abidīn ((Hanafi), vol.7, p.357), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.302).

- There are many *Hadīths* that establish the permissibility of agency. One such *Hadīth* was narrated in Al-Bukhārī and Muslim that the Prophet (pbuh) sent agents to collect the *zakāh*” (alms tax). Another narration establishes that he (pbuh) commissioned ^cAmr ibn ‘Umayyah Al-Damariy as an agent to ask for the hand of ‘Umm Ḥabībah bint ‘Abū Sufyān in marriage.¹¹ Another *Hadīth* establishes that he (pbuh) commissioned ‘Abū Rāfi‘ as an agent to accept marriage with Maymūnah bint Al-Ḥārith.¹² Another narration also establishes that he (pbuh) commissioned Ḥakīm ibn Huzām as his agent to buy an animal for ritual sacrifice, and his commissioning of ^cUrwah Al-Bāriqī to buy a sheep.¹³ Proof is also provided in Al-Bukhārī’s narration that he (pbuh) commissioned an agent to give a camel as repayment of his debt, saying: “The best among you are the best in repaying their debts”.
- The Muslim nation has established a consensus on the permissibility of agency contracts, since individuals often cannot administer all of their affairs, and thus have a need to commission agents.¹⁴ Thus, the agency contract is a means for cooperation in doing good, and it is permitted thus. Such cooperation is often needed since different people possess different skills. For instance, an individual may need to hire a legal agent who is better at legal argument (i.e. a lawyer) to defend him in a court of law.

¹¹Narrated by ‘Abū Dāwūd in his *Sunan* (vol.1, p.468). Al-Bayhaqī said in *Al-Ma‘rifah*: “We heard on the authority of ‘Abū Ja‘far Muhammad ibn ‘Alī that he narrated that *Hadīth*”. He also narrated it in *Al-Ma‘rifah* and *Al-Khilafiyāt* without a chain of narrators. He provided a full narration in his *Sunan* on the authority of ‘Ibn ‘Ishāq that ‘Aūlā Ja‘far told him that the Prophet (pbuh) sent ^cAmr ibn ‘Umayyah Al-Damariy to Al-Najāshī as an agent to marry him (pbuh) to ‘Umm Ḥabībah, and pay four hundred Dinārs on his behalf (pbuh), c.f. ‘Ibn Ḥajar (, p.251 onwards).

¹²Narrated by Mālik in *Al-Muwatta*, and also narrated by ‘Alīmad, Al-Tirmidhī, Al-Nasā‘ī, and ‘Ibn Hibbān on the authority of Sulayman ibn Yasār that the Prophet (pbuh) sent ‘Abū Rāfi‘ and a man from the ‘Ansār as agents to marry him to Maymūnah bint Al-Ḥārith while he was still in Madīnah prior to leaving it for Ḥajj. ‘Ibn Taymiyah used this *Hadīth* in *Muntaqā Al-‘Akhbār* to conclude that he (pbuh) married her prior to entering the state of ritual purity for pilgrimage, and that ‘Ibn ‘Abbās was not aware of that marriage, c.f. ‘Ibn Ḥajar (, p.252), Al-Shawkānī (, vol.5, p.269).

¹³The first agency *Hadīth* was narrated by ‘Abū Dāwūd and Al-Tirmidhī on the authority of Ḥabīb ibn Thābit that the Prophet (pbuh) told him to sacrifice a sheep and give a Dinār as charity. The second agency *Hadīth* is also valid as narrated by ‘Alīmad, Al-Bukhārī, ‘Abū Dāwūd, Al-Tirmidhī, ‘Ibn Mājah, and Al-Dāraqutnī on the authority of Shabīb ibn Gharradah Al-Salāmī Al-Kūfī on the authority of ^cUrwah ibn ‘Abī Al-Ja‘d Al-Bāriqiy. The *Hadīth* also stated that the Prophet (pbuh) “prayed for him to be blessed in his trading, and his trading became extremely profitable”, c.f. ‘Ibn Al-‘Athīr Al-Jazarī (, vol.12, p.289), Al-Hāfiẓ Al-Zayla‘ī (1st edition, (*Hadīth*), vol.4, p.90), ‘Ibn Ḥajar (, p.251), Al-Shawkānī (, vol.5, p.270).

¹⁴Ibn Qudāmah (, vol.5, p.79), ‘Ibn Al-Humām ((Hanafi), vol.6, p.3), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.217), ‘Abū ‘Ishāq Al-Shīrāzī (Shāfi‘ī), vol.1, p.348), Al-Sarakhsī (1st edition (Hanafi), vol.19, p.2 onwards).

52.3.1 Legal status

The default legal status of agency is permissibility. However, it may become recommended if it can assist an individual in performing a recommended task. Also, if the agency can ward-off adverse consequences to the principal, it becomes obligatory on the agent to protect the principal. Similarly, it may be reprehensible if it assists in performing a reprehensible act, or forbidden if it assists in forbidden tasks.

Chapter 53

Contract Conditions

There are many conditions for the validity of an agency contract, some pertaining to the contract language, some pertaining to its object, and some pertain to the principal and agent. For instance, we shall see that jurists agree that the principal may be female, absent, or sick. Moreover, the majority of jurists ruled that the principal may be a present male in good health, while 'Abū Ḥanīfa did not permit the agency contract in that case. Also, we shall see that the conditions for agents permit them to perform on behalf of others tasks that they could perform on their own behalf. However, jurists agree that it is not permitted for a person to commission his enemy as an agent, and the Mālikīs do not permit an infidel to be commissioned as an agent in trading, lest he conducts an illegal sale. They also do not permit commissioning an infidel as an agent for collecting debts from Muslims, lest he use that power to obtain a higher status among them.

53.1 Conditions for contract language

The Shāfi‘īs stipulated two conditions for the agency contract language:

1. The principal must make a verbal offer to establish his consent to agency, either explicitly or metaphorically (e.g. “you are in my place for selling this house”). Acceptance by the agent may take place verbally or through his actions, in analogy to a guest who is offered food, where acceptance by action is permitted.
2. The contract must not be suspended pending a condition (e.g. if so-and-so returns from his travels, then you are my agent for such-and-such).

The latter condition is not as restrictive as might appear. For it is permitted to conclude an unconditional agency contract, and suspend the actual action pending the satisfaction of a condition (e.g. “you are my agent for selling this house; conclude that sale when so-and-so arrives”). Moreover, it is permissible for a specific period of agency (e.g. one month) to be specified.

53.2 Conditions for the principal

The principal must be himself eligible to take the action for which he commissions an agent, and the legal status of such actions would thus accrue to him. Thus, it is not permissible for an insane person, an undiscerning child, or a person in a coma, to commission an agent. In all such cases, the potential principal would not satisfy the discernment condition that would make him eligible for taking such an action or being bound by its legal status. Moreover, a discerning child may not commission an agent for taking actions that he may not take himself (e.g. divorce, gift-giving, charity-giving, and other actions that result in pure financial losses. On the other hand, such a discerning child is permitted [in the Ḥanafi school] to take financially beneficial actions such as accepting gifts, and he may thus commission an agent for such action. In intermediate cases such as trading, where the action may result in financial gains or losses, the ruling depends on whether or not the discerning child is permitted to conduct the trade himself. If the child is permitted to trade on his own behalf, then he is also permitted to commission an agent for trading on his behalf. If he requires a legal guardian's permission for trading, then the agency contract is also suspended pending the guardian's approval.¹

As we have seen previously, Al-Šāfi‘ī did not permit a discerning child to deal in his property. Thus, he does not permit any child to commission an agent. This is also the ruling in the Mālikī and Ḥanbalī schools.²

'Abū Ḥanifa ruled that the agent's ability to conduct a trade is what matters in the agency contract. Thus, he permitted a Muslim principal to commission a Jewish or Christian agent for buying wine or pork.

Jurists agree that a mentally incompetent person, who is put under legal guardianship, may not commission an agent for financial dealings on his behalf, since he may not conduct such dealings himself. Moreover, the non-Ḥanafis ruled that a woman or a person in a state of ritual purity for pilgrimage may not commission an agent to conduct a marriage contract, since they may not conduct that contract themselves. Also, jurists agree that an immoral father, who is not permitted to represent his daughter in marriage, may not commission an agent to take his place in such a marriage.

In all such cases, if a person cannot conduct a contract himself, he may not commission an agent to conduct it on his behalf. However, the Shāfi‘is permitted a single exception to this general rule by permitting a blind person (whom they do not permit to trade in goods that must be inspected visually) to commission an agent for inspecting goods and trading on his behalf. They argued that this exception is stipulated due to necessity of conducting such trades.

¹Al-Kāṣānī ((Ḥanafi), vol.6, p.20), 'Ibn Al-Humām ((Ḥanafi), vol.6, pp.12,134).

²Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.217), 'Ibn Qudāmah (, vol.1, p.349), Al-Jazīrī (1986, vol.3, p.236 onwards).

53.3 Conditions for the agent

The agent must be sufficiently sophisticated to understand the nature of the business that he conducts on behalf of the principal, and thus he must distinguish between good and bad deals. Consequently, jurists agree that insane persons and non-discerning children may not be commissioned as agents. On the other hand, the Ḥanafis permitted a discerning child to act as agent, whether or not he is permitted to conduct trade on his own behalf. In this regard, all jurists agree on the general view that the agent represents the principal in his legal rights and responsibilities, and thus must be himself eligible for such rights and responsibilities. The Ḥanafī position is supported by the fact that 'Ibn 'Umm Salamah acted as an agent for the Prophet (pbuh) in a marriage contract while he was still a [discerning] child.

However, the Shāfi'īs, Mālikīs, and Ḥanbalis ruled that insane individuals, persons in coma, and all children (discerning or otherwise) are ineligible for agency since they cannot deal on their own behalf. Thus, a mentally incompetent person may not be an agent in financial dealings. Moreover, the majority of non-Ḥanafī jurists also ruled that a woman, or a man in a state of ritual purity for pilgrimage, may not act as an agent in a marriage contract, since they may not conduct such a contract on their own behalf. The Shāfi'īs also do not permit the commissioning a blind person as an agent in dealings that require vision.

As an exception to the general rule, the majority of the Shāfi'īs permitted the agency of a discerning child to give permission for entry into a house, delivery of a gift, pilgrimage, supererogatory acts, sacrificing animals, and distribution of *zakāh*.

The Ḥanafīs further stipulated that the agent must know of the agency contract, and must accept it seriously. Thus, if an agent were to sell the principal's property before he is commissioned as a selling agent, the sale is not concluded on behalf of the principal unless both the principal and agent approve it after the establishment of the agency. In this regard, the agent is considered informed of the agency contact if he heard such an offer directly from the principal, received it in a letter, received it with a messenger, or if he heard it from two witnesses or one witness (honorable or not) whom the agent believed.³

Also, jurists agree that the principal must specify the agent either by name or by identifying him physically. Also, the agent must know his principal either by name or by his characteristics.⁴

The Mālikīs stipulated three conditions for the principal and the agent: (i) freedom, (ii) sanity, and (iii) being of legal age. The Shāfi'īs further stipulated that a person serving as the agent of a judge or ruler in financial dealings must be known to be of good character (*'adl*).

³ Al-Kāsānī ((Ḥanafī), ibid., p.20 onwards), Al-Sarakhsī (1st edition (Ḥanafī), vol.19, p.158 onwards), 'Ibn Ḩāfiẓ Abīdīn ((Ḥanafī), vol.4, p.417), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.218).

⁴ Al-Kāsānī ((Ḥanafī), ibid.), *Hāshiyat Al-Dusūqī* (vol.3, p.378), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.219), Al-Buhūtī (3rd printing (Hanbali), vol.3, p.450).

53.4 Conditions for contract objects

The Hanafīs ruled that the object of an agency contract cannot be the utilization of public properties (e.g. collection of wood from public lands, mining, etc.). In such cases, if an agent is commissioned and performs the job, he is deemed to perform it on his own behalf, and none of the output accrues to the principal. On the other hand, the majority of non-Hanafī jurists permitted agency in such tasks, whereby the principal and agent would share the proceeds according to their respective claims. In this regard, the sharing ratios vary from one case to another, as the benefits vary.⁵ The non-Hanafīs supported their ruling by the fact that utilization of public properties is one of the means of acquiring ownership, and thus the act resembles trading in this respect, and agency is permitted by analogy.

Jurists agree that the object of an agency contract must belong to the principal. This follows from the fact that the principal cannot give the agent the right to deal in the property of another.

The Shāfi‘īs also stipulated a condition that the object of an agency contract be sufficiently known to ensure that the contract does not contain significant *gharar*.

Jurists agree that agency is not effected in borrowing. Thus, if a principal commissions an agent to request a loan from a third party, the agent is considered the debtor. On the other hand, they allow the principal to send the agent with a message to borrow on his behalf (e.g. the agent may say “so-and-so requests to borrow \$x, and he has sent me to collect the amount if you agree”).

Jurists also agree that the object of an agency contract must be eligible for legal representation, e.g. financial dealings, etc. However, agency is not permitted in pure acts of worship (e.g. praying and fasting). In such acts of worship, the individual is required personally to show the perseverance and piety required to fulfil those obligations, and thus he may not commission another as his agent in such acts. Also, jurists ruled that an agency contract for oath swearing is not permitted, since the purpose of swearing is to establish the truthfulness of the one taking the oath. Thus, oath taking is a legal procedure in which the individual supports a legal claim by appealing to the greatness of Allāh. Thus, agency is not permitted in this case. Finally, jurists agree that a person may not commission an agent to impregnate his wife, since the purpose of impregnation is to have biological offspring for the father.

On the other hand, most jurists permitted agency in acts of worship that have a financial dimension (e.g. payment or receipt of charities, performance of pilgrimage on behalf of an incapacitated or deceased individual, slaughtering sacrifice animals, etc.).⁶ In the cases of distributing *zakāh* and slaughtering sacrificial animals, the purpose is delivery of the money and meat, respectively,

⁵ Indian Authors ((Hanafi), vol.3, p.440), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.221), *Rawdat Al-Tālibīn* (vol.4, p.291).

⁶ Ibn Ḥāfiẓ ((Hanafi), vol.7, p.271), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.297), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.219), 'Ibn Qudāmah (, vol.5, p.83), Al-Dardīr ((Mālikī)A, vol.3, p.377 onwards), *Rawdat Al-Tālibīn* (vol.4, p.294).

and that can clearly be accomplished through agency.

However, the Mālikīs did not permit agency in pilgrimage. They argued that the financial aspect of pilgrimage is transient, and that the intent of the ritual is self-discipline and glorification of Allāh, which cannot be accomplished through agency.⁷

As we have seen, there are a number of differences among the jurists regarding the actions that may be performed through agency and those that may not. Those differences can best be understood by first dividing all actions into two categories: (i) those that pertain to legal affairs (lit. the rights of Allāh), and (ii) those that pertain to the rights of others.

53.4.1 Agency in Rights of Allāh

An agent in legal affairs may be commissioned to establish the committal of a crime that warrants punishment, the type of punishment that needs to be exacted, or the act of exacting the punishment.

1. Prosecution Agency

The Ḥanafis ruled that in cases where the need for punishment is not established through legal disputation (e.g. punishments for adultery or drinking wine), then agency is not permissible for establishing such punishments. Such punishable actions are established by legal proof or confession, and require no legal claims by a wronged person or legal disputation.

On the other hand, 'Abū Ḥanifa and Muḥammad ruled that if a legal claim and disputation are necessary (e.g. if there is a claim of theft, slander, or punitive damages), then agency is permissible to prove the charge. 'Abū Yūsuf disagreed and insisted that such claims only require material proof or admission by the principal, and thus denied the permissibility of agency. In this regard, 'Abū Yūsuf argued from the opinion that agency is not required in exacting legal punishments (*hudūd*) that establishing the need for exacting such punishments is part of the process, and thus denied agency in prosecution as well. On the other hand, 'Abū Ḥanifa and Muḥammad, argued that the reason for impermissibility of agency in exacting legal punishments (as we shall show below) does not apply to prosecution, and hence distinguished between the two parts of the legal process.⁸

The Shāfi'īs did not permit agency in establishing the need to exact legal punishment, since the affected rights in this case are the rights of Allāh (swt). In

⁷The Shāfi'īs stipulated a general demarcation rule for the permissibility of agency. Thus, they ruled: agency is permissible in general, the exceptions being: (i) powers of attorney, (ii) the performance of legal punishment or permitted revenge, (iii) the collection of the capital of a *salam* contract, or any other fungible property eligible for *ribā*, (iv) copulation, (v) bearing witness, (vi) oath swearing, (vii) confession or admission of rights, (viii) injurious estrangement of one's wife, (ix) acts of worship other than pilgrimage, distribution of *zakāh*, and slaughter of sacrificial animals, c.f. Al-Sharqāwī ((Shāfi'ī), p.169). As we shall see, the Shāfi'ī exception of the performance of permitted revenge (*qawad*) is disputable.

⁸Al-Kāṣānī ((Ḥanafī), ibid., p.21), Ibn Al-Humām ((Hanafī), vol.6, p.7), Al-Tahāwī ((Hanafī), p.109).

this regard, Allāh (swt) ordered us to do all that we can to avoid exacting such punishments, whereas prosecution attempts to establish the need to exact the punishment. Thus, they argued, agency would not be permitted in prosecution. On the other hand, they permitted agency in prosecution in matters that pertain to the rights of other individuals (e.g. punitive damages, slander, etc.), in analogy to the permissibility of agency to establish financial rights.⁹ In contrast to the Ḥanafīs, we shall see later in the chapter that the Shāfi‘īs permitted agency in exacting the legal punishment.

The Ḥanbalis permitted agency in establishing the need for punishments whether the crime affected the rights of others (e.g. punitive damages or slander), or the rights of Allāh (e.g. adultery). In the former case, the need to protect the rights of individuals often require the employment of such legal agents, whether the principal is present or absent. For the latter case, the Ḥanbalis ruled that agency is permitted based on the tradition that the Prophet (pbuh) commissioned an agent to establish the need and exact the punishment for adultery by saying to the agent: “If she admits her sin, then stone her”. The *Hadīth* is proof that the crime of adultery was not yet established, and the agent was given the task both of establishing the need for punishment, as well as exacting that punishment.¹⁰

On the other side of the legal dispute, all jurists agreed that an agent may be commissioned to defend the accused and attempt to establish that there is sufficient doubt to prevent the implementation of punishment.

2. Exacting punishments

All four major Sunni schools agreed that the ruler is permitted to commission an agent to exact the legal punishments in crimes that pertain to the rights of Allāh (swt) and in cases of punitive damages. However, there are differences among the schools regarding the validity of agency in exacting punishments when the principal is absent. In what follows, I shall discuss the details of each school’s rulings separately:

- ’Abū Hanīfa and Muḥammad ruled that agency must be initiated by the principal whose rights were affected by the crime (e.g. in cases of theft or slander). Thus, they permitted agency only if both the principal and the agent are present at the time of exacting the punishment. They permitted agency in this case based on the view that many individuals will not be able to exact the punishment themselves. While some Ḥanafī jurists argued that agency is also permitted in exacting the punishment in the absence of the principal, most Ḥanafīs argued that the principal’s presence is required. The majority based their view on the fact that doubts can prevent the exacting of punishments. Thus, if the principal is absent, there is the possibility that he might have forgiven the transgressor or

⁹’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.349), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.221).

¹⁰Ibn Qudāmah (, vol.5, p.81), Mar‘ī ibn Yūsuf (1st printing (Hanbali), vol.2, p.150).

dropped his charge, and the agent would not be permitted to exact the punishment when such doubts exist. The minority argued that presence of the principal is not necessary since the matter would have already reached the judge, and thus the right becomes a right of Allāh (swt), which cannot be shared by others. Thus, the minority's view is that even if the principal were to forgive the thief, the legal punishment must still be exacted. However, the accepted opinion is that of the majority: that the exacting of legal punishments requires the presence of the transgressed upon.

On the other hand, 'Abū Yūsuf did not permit agency in the establishment or the exacting of punishments in the cases of theft or slander. It appears that he is arguing generally that it is meaningless to commission agents in legal cases involving the rights of Allāh (swt), whether or not establishing that right of Allāh (swt) requires legal claims and disputation. In all such cases, he argued, the ruler is required to exact the punishment, and the transgressed upon has no control over the matter.¹¹

All jurists of the Ḥanafīs and other schools agree that agency is permitted in establishing and exacting discretionary punishments (*ta'āzīr*).¹² In such cases, the agent may exact the punishment in the presence or absence of the principal, since discretionary punishments are the rights of individuals. Such punishments are not prevented by doubts, in contrast to legal punishments that are thus prevented.

As for exacting retaliatory punishments (*qisās*), the Ḥanafīs ruled that the principal (e.g. nearest relative of the killed individual) must be present for agency to be permissible. In this case, agency is permitted since the principal may not be able to exact the punishment himself. However, if the principal is absent, then agency in exacting the punishment is not permissible, in accordance with the opinion of the majority of Ḥanafīs who find that doubts may exist in this case since the principal may have forgiven the transgressor.

In summary, the Ḥanafī position is that agency in exacting legal and retaliatory punishments is permitted only the presence of the principal (the transgressed upon). This ruling is based on the general principle that such punishments would be prevented if sufficient doubt existed, and the ruling that the absence of the transgressed upon provides sufficient doubt that they might have forgiven the transgressor.¹³

- The Mālikīs ruled that agency is permitted in exacting punishments, whether the principal is present or absent.¹⁴

¹¹ Al-Jazīrī (1986, vol.3, p.232), 'Ibn Hubayrah ((Ḥanbalī), p.208).

¹² Al-Kāsānī ((Ḥanafī), ibid.), Al-Dardīr ((Mālikī)B, vol.3, p.503), *Rawdat Al-Tālibīn* (vol.4, p.293), 'Ibn Qudāmah (, vol.5, p.207).

¹³ Al-Sarakhsī (1st edition (Ḥanafī), vol.19, pp.9,106), 'Ibn Al-Humām ((Ḥanafī), vol.6, pp.6,104 onwards), Al-Kāsānī ((Ḥanafī), vol.6, p.21 onwards), 'Ibn ḨĀbidīn ((Ḥanafī), vol.4, p.218).

¹⁴ 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.297), Al-Dardīr ((Mālikī)A, vol.3, p.378).

- The majority of Ḥanbalīs ruled that agency is permitted in exacting punishment whether the principal is present or absent. They based this ruling on the *Hadīth* where the Prophet (pbuh) said to 'Anīs: "Go to this man's wife and ask her if she committed adultery, and have her stoned if she admits the charge". He proceeded to ask her, and she admitted the crime, and he ordered her stoning.¹⁵ There are also other traditions in which the Prophet (pbuh) ordered the stoning of Maᶜiz, and he was thus stoned. It is also recorded that ḨUthmān (mAbpwh) commissioned ḨAḍīl (mAbpwh) to exact the punishment of drinking wine on Al-Walīd ibn ḨUqbah. Then ḨAḍīl offered Ḩasan to be his agent in exacting the punishment, but the latter refused. ḨAḍīl then commissioned ḨAbdullah ibn Jaᶜfar as an agent to exact the punishment, which he did while ḨAḍīl counted [the lashes]. The Ḥanbalīs also argued generally that the ruler cannot exact [all] punishments himself, and thus agency is necessary.

Some Ḥanbalīs agreed with the predominant Ḥanafī opinion that the principal's presence is required in the exacting of retaliatory and slander punishments. This group reasoned similarly to the Ḥanafīs that the principal's absence gives rise to sufficient doubt that he may have forgiven the transgressor, thus preventing the exacting of the punishment. However, the majority of Ḥanbalīs adhered to the opinion that agency in exacting punishments is valid whether or not the principal is present. In this regard, they argued that: (i) the chances of forgiveness are remote, and (ii) had the principal forgiven the transgressor, he could have informed his agent. Thus, the default situation is non-forgiveness, and agency in exacting the punishment is permitted in his absence.¹⁶

- The Shāfi'īs ruled that agency is valid in exacting punishments for crimes affecting the rights of individuals (e.g. retaliatory damages, slander, etc.) in analogy to exacting financial rights. In fact, they argued, it may be obligatory to hire an agent in the exacting of punishment for slander or piracy. In this regard, they permitted agency in the exacting of such punishments whether the principal is present or absent.

Al-Shāfi'ī also permitted agency in exacting punishments for crimes that affect the rights of Allāh (swt), based on the above cited *Hadīths* of 'Anīs and Maᶜiz, and ḨUthmān's delegation to ḨAḍīl to exact the wine-drinking punishment on Al-Walīd ibn ḨUqbah.¹⁷ Al-Bukhārī has also narrated traditions that the Prophet (pbuh) commissioned agents for stoning individuals who were established to have committed adultery, and lashing of individuals who were established to have imbibed intoxicants.

In summary, the Mālikīs, Shāfi'īs, and Ḥanbalīs permit agency in exacting punishments for punitive damages and legal punishments for crimes

¹⁵Narrated in *Al-Muwatta'*, 'Alīmad, and the six major books of *Hadīth* with the exception of 'Ibn Mājah, on the authorities of 'Abū Hurayrah and Zayd ibn Khālid Al-Juhanī.

¹⁶Ibn Qudāmah (, vol.5, p.84), 'Ibn Hubayrah ((Ḥanbalī), p.208).

¹⁷Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.221), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.349).

affecting the rights of Allāh (swt), whether or not the principal (affected party) is present. On the other hand, the majority of the Ḥanafis require the presence of the principal for exacting the punishment.

- Jurists agree that it is not permissible to commission an agent to exact a forbidden punishment (e.g. punitive estrangement of wives).¹⁸ It is also not permissible to commission agents to usurp an object or steal it, or to commit any other crime. In all such cases, the criminal acts would be attributed to the one committing them, and agency is rendered meaningless.

53.4.2 Agency in human legal affairs

There are two categories of transgressions against human rights, as they pertain to exacting punishments:

1. The first class of transgressions includes murder and amputations, for which punishments may not be exacted if there is sufficient doubt that the accused committed the crime. In this class of crimes, we have seen that 'Abū Ḥanīfa and Muḥammad permit agency in prosecuting such crimes to establish the need to exact punishment. We have also seen that the dominant Ḥanafi opinion in this case is impermissibility of agency in exacting such punishments in the absence of the principal, since such absence provides for sufficient doubt that he may have forgiven the transgressor.
2. The second class includes all financial transgressions and other lesser crimes. For this class of transgressions, all jurists permit an agent to collect the financial penalty on behalf of the principal, even if there is a possibility that he forgave the transgressor. In this case, all jurists agree that agency is granted both in prosecution, and in exacting the punishment. This permission is permitted due to people's need for having legal representation. In this regard, a valid narration states that ^cAlī (mAbpwh) commissioned ^cAqīl as a legal representative in the court of 'Abū Bakr (mAbpwt), and when the former became elderly, he commissioned ^cAbdullah ibn Ja'far as a legal representative in the court of ^cUthmān (mAbpwt). ^cAlī justified this usage of legal agents by saying: "Legal disputes are troublesome, and the devil is always present at such disputes, that is why I hate to attend such disputes".

However, jurists differed over the requirement that the principal's adversary must accept the former's legal representation in disputes over financial damages:

- 'Abū Ḥanīfa ruled that agency in such disputes is not permitted unless: (i) the principal is present with his agent at the legal proceedings, (ii) he is sick or traveling for three or more days, (iii) he does not possess the requisite skills for engaging in legal disputes, (iv) the principal is a shy

¹⁸ Al-Dardīr ((Mālikī)B, vol.3, p.504), Mar^cī ibn Yūsuf (1st printing (Ḥanbalī), vol.5, p.22).

covered woman, (v) the principal is a menstruating woman and the legal proceedings are taking place in a mosque, or (vi) the adversary accepts representation of the principal claimant. Otherwise, the adversary has the right to require that the claimant attend the legal proceedings, since the legal dispute - like debts - cannot be transferred to a third party without his consent.¹⁹

- 'Abū Yūsuf, Muḥammad, and the non-Ḥanafīs ruled that agency is permitted both in prosecution as well as representation at legal prosecution, whether or not the principal claimant is present or absent, and irrespective of the adversary's acceptance or rejection of the claimant's agency. In this regard, they argued that legal disputation is a right that is eligible for legal representation. Thus, the claimant has the right to send an agent in his place, in analogy to the cases where he is sick or traveling away, as well as his right to send an agent to collect a debt. They also argued based on the need to commission agents who are more skilled at legal disputation, and the consensus of the Prophet's companions (mAbpwt) that such agency is permitted, as evidenced in the above cited story of "Alīs representation in various courts."²⁰
- One exception jurists stipulated in this case is that the claimant's agent must not be an enemy of the adversary. The Mālikīs also stipulated that if the claimant had already participated in three legal sessions with his adversary, he may not later commission an agent unless he has a valid excuse such as illness.
- The Ḥanbalīs enumerated two conditions for the permissibility of agency in legal disputes:
 1. The agent must not be aware that his principal is the transgressor in initiating the legal dispute, as per the verse: "So be not an advocate for those who betray their trust" [4:105].
 2. The agent must know the truth of the claim he makes on behalf of his principal.
- The dominant Ḥanafī opinion is that the judge should decide whether or not agency is permitted. Thus, if he finds that the adversary is rejecting the claimant's agency out of spite, he can accept the agency without the adversary's consent. On the other hand, if he finds that the principal hired

¹⁹ Al-Sarakhsī (1st edition (Hanafī), vol.19, p.7 onwards), 'Ibn Al-Humām ((Hanafī), vol.6, pp.6,104-5), Al-Ķasānī ((Hanafī), vol.6, p.22), Al-Taħāwī ((Hanafī), p.108), 'Ibn āAbidīn ((Hanafī), vol.4, p.418; vol.7, p.280), *Al-Parā'id Al-Bahiyya fī Al-Qawā'id Al-Fiqhiyya* by Shaykh Maħmūd Ħamza (p.134). 'Ibn āAbidīn said: "There is no juristic difference over permissibility [of agency], jurists only differ over the bindingness of agency, i.e. whether or not it can be nullified by the adversary. In this regard, 'Abū Hanīfa ruled that the adversary can nullify it, while 'Abū Yūsuf and Muḥammad ruled that it is binding on the adversary".

²⁰ *Mukhtaṣar Khaṭīb* (p.216), Al-Sha'arānī ((Shāfi'i), vol.2, p.83), 'Ibn Qudāmah (, vol.5, p.81), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'i), vol.1, p.348), Al-Dardīr ((Mālikī)A, vol.3, p.378), 'Ibn Hubayrah ((Hanbalī), p.207), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.471).

an agent to gain an unfair advantage over his adversary, he may reject the agency.²¹

Agency in testimony

Jurists agree that agency is not permissible in legal testimony, since the legal effect of the testimony is predicated on his own credibility and knowledge of what happened. This effect would not be accomplished if an agent were to testify on behalf of the one who witnessed the relevant events.²² Moreover, jurists ruled that agency is not permitted in the fulfillment of vows and oaths, since Allāh's name is invoked in such vows and oaths, and thus their fulfillment becomes similar to acts of worship. For similar reasons, agency is not permitted in legal swearing, oath taking, condemnation, or testimony resulting in the annulment of a marriage, in which the name of Allāh is invoked.

Agency in admission/confession

Muhammad stated in *Al-'Aṣl* that the Ḥanafīs permit a principal to commission an agent to admit legal rights or obligations, which is also the Mālikī and Ḥanbalī position. They argued that such admissions establish liability for a right through a verbal statement, and thus permitted agency in such cases in analogy to sales.²³

On the other hand, the majority of Shāfi'īs ruled that agency is not permitted for such admissions of rights or obligations. They reasoned that such admissions are essentially reports of rights based on the knowledge of the principal. In this regard, they argued by analogy to testimony that agency is not permitted in this case.²⁴ The majority of jurists rebutted this Shāfi'ī analogy between admission and testimony by arguing that the latter merely reports a right for another party, whereas the former establishes a right directly.

Agency in debt-collection

Jurists permit agency in debt-collection, since it is often the case that the principal is himself incapable of collecting debts owed to him. Thus, in analogy to agency in trading and other financial transactions, they ruled that agency in debt collection is a necessary business practice, which is thus permitted. In the case of receiving the capital in a *salam* (forward sale) or *ṣarf* (currency exchange) contract, the agent must receive the money during the contract session. This follows since the principal himself would be bound to collect such monies during the contract session, and thus the agent may only collect it thus. In all

²¹ Ibn 'Abidīn ((Hanafī), vol.4, p.418).

²² Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī)), vol.5, p.22), 'Ibn Qudāmah (, vol.5, p.82).

²³ Al-Kāsānī ((Hanafī), vol.6, p.22), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.297), 'Ibn Qudāmah (, vol.5, p.82).

²⁴ Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī)), vol.2, p.221), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.349).

cases, the payer of debts or other obligations is exonerated of his liability as soon as the agent receives the payment.²⁵

Agency in debt-payment

Jurists agree that a debtor may commission an agent to pay his debts on his behalf. This permission is based on the view that the debtor can pay his debts himself, and that he is sometimes unable to do so in person, and thus may commission an agent to pay it on his behalf.

Similarly, it is permissible to commission an agent to exonerate a third party of his debts. This follows from the fact that it is permissible to hire an agent to establish a debt as well as to collect a debt. Therefore, it follows that it is permissible to commission an agent to exonerate a debtor.

Agency in common contracts

More generally, the Hanafis ruled that all contracts that a person can conduct on his own behalf can be conducted through an agent.²⁶ Jurists mentioned a number of specific dealings - in addition to the ones listed above – for which it is permissible to commission an agent to conduct the contract on his behalf:²⁷

- Preemption, returns of defective merchandise, and division of proceeds.
- Marriage, divorce, divorce at the instance of the wife in return for abandoning financial claims, reconciliation of blood revenge, and reconciliation of a denial of debt in exchange for financial compensation.
- Gift giving, charity-giving, simple lending and borrowing, depositing, pawning, and requests of gifts.
- Partnership, silent partnership, and borrowing, provided that the agent borrows on the principal's behalf rather than his own (e.g. “so-and-so sent me to borrow \$x”). In the latter case the agent is in fact considered a messenger rather than an agent.

Explicit mention of agency

It is essential in certain contracts that the agent makes the agency explicit:

- In marriage, the agent must say: “I accept the marriage on behalf of my principal so-and-so”, or “I marry so-and-so who is my principal”, etc. Thus, if he does not specify the marrying party, or if he were to specify himself as the contracting party, he would be marrying, not his principal.

²⁵ Al-Kāsānī ((Hanafi), ibid.).

²⁶ Ibn Rushd Al-Ḥafid ((Mālikī), vol.3, p.109).

²⁷ Al-Kāsānī ((Hanafi), vol.6, p.23), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.297), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.220 onwards), 'Ibn Qudāmah (, vol.5, p.81), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.348), 'Ibn Al-Humām ((Hanafi), vol.6, p.21 onwards).

- In gift-giving, the agent must say: “My principal gives this as a gift”, and the gift is not valid if he says “I give this as a gift”, since it is not his to give.
- In charity-giving, if the agent does not mention that the charity is given on behalf of his principal, he would be considered the charity-giver.
- In a contract where monetary compensation is paid for exoneration of a murderer or exoneration of a denied debt, it is necessary for the agent to say “I accept this settlement on behalf of so-and-so...”, otherwise the settlement is not valid. This is in contrast to exoneration based on verbal admission (*'iqrār*), where either the principal or the agent may be named in the contract.
- In deposits, simple loans, pawning, partnerships, and silent partnerships, the agent must explicitly refer to his principal as the contracting party.²⁸

Agency in utilizing public properties

We have seen that the Hanafis render impermissible commissioning an agent for the utilization of public properties (e.g. watering, hunting, mining, etc.), and consider that any output in such cases belongs to the acting agent rather than the principal. We have also seen that the Mālikis, Ḥanbalis, and most Shāfi'is ruled that such utilization is yet another permissible means of establishing ownership, and thus render agency for such acts permissible.

Legal agency of an attorney

We have seen from the story of ^cAlī's commissioning of ^cAqīl as a legal representative (advocate) in the courts of ^cAbū Bakr and ^cUmar and the commissioning of ^cAbdullah ibn Ja^cfar in the court of ^cUthmān that the commissioning of attorneys as legal agents is permissible.²⁹ Moreover, jurists argued that there is clear need for hiring such legal representatives, since many individuals are either incapable of defending themselves, or hate to be a direct party to the legal dispute.³⁰

Agency in trading

We have seen that jurists agree that agency is permitted in trading, since the principal is permitted to trade on his own behalf, and thus may commission an agent to trade on his behalf. However, jurists qualified this permission by requiring the agency to be devoid of excessive ignorance (*jahālah*) in restricted trading agencies. In order to understand this condition, we discuss jurists'

²⁸ Al-Jazīrī (1986, vol.3, p.233).

²⁹ The tradition is narrated in Al-Bayhaqi's *Sunan* (vol.6, p.81).

³⁰ *Al-Hidāyah* (vol.2, p.136), *Mukhtaṣar Khalīl* (p.216), ^cAbū-'Ishāq Al-Shīrāzī ((Shāfi'i)), vol.1, p.148), 'Ibn Qudāmah (, vol.5, p.81).

opinions according to the Ḥanafī distinction between unrestricted and restricted trading agencies:

- In unrestricted trading agencies, the principal authorizes the agent to buy a general item without specifying characteristics or price, etc. For instance, the principal in this case may simply say to the agent: “Buy me any dress you deem appropriate”. In this case, since the principal gave the agent full discretion, the Ḥanafīs ruled that no level of ignorance would invalidate the agency. This ruling is based on analogy to silent partnerships.

The Mālikīs agreed with the Ḥanafī permission of unrestricted agencies in trading as well as other financial dealings, marriage, divorces, etc. Thus, they permit the principal to commission an agent for all dealings except the ones he explicitly excludes from the agency.

On the other hand, the Shāfi‘īs and Ḥanbalīs rendered unrestricted agencies impermissible. Their ruling is based on the view that such agencies contain significant *gharar* that is unnecessary.

- In restricted agencies, the principal does not give explicit full discretion to the agent. For instance, the principal may say to the agent: “Buy a house for me”. For such agencies, the legal effect of ignorance may be inferred based on reasoning by analogy (*qiyās*), or through juristic approbation (*istihsān*):

- The ruling by analogy dictates that such agencies are invalidated by ignorance, no matter how minor or major. Thus, the principal must specify the genus, type, characteristics, and price of the object to be bought by the agent. The ruling thus follows from the fact that minor ignorance invalidates regular trading, and hence invalidates trading agencies as well.
- The ruling by juristic approbation is that minor ignorance does not invalidate such agencies, while major ignorance does. This juristic approbation is based on the tradition that the Prophet (pbuh) gave a Dinār to Ḥakīm ibn Ḥuzām to buy a sacrificial animal. Had minor ignorance been sufficient grounds for invalidating agencies, the Prophet (pbuh) would not have given him such instructions without specifying the animal’s characteristics and the exact price to pay. More generally, agency is based on giving the agent a certain amount of permitted discretion. Thus minor ignorance does not lead to disputes, and hence does not invalidate the agency contract.

In this regard, when ruling according to juristic approbation, we need to provide demarcation criteria to distinguish between minor and major ignorance, and to give examples for each:

- The ignorance is considered minor if the agency contract specified the object to be purchased with a name that limits it to a single relatively

homogeneous type, and either the price or the characteristics were mentioned. Thus, naming the object's characteristics or price by itself is not sufficient, and the type must be named either explicitly, or implicitly if there is little variation among objects described by the given name.

For instance, if the principal tells the agent: "buy me English wool" the agency would be valid, since the characteristics of the wool were specified. Alternatively, if he said: "buy me \$100-per-yard-wool", the agency would be valid since the price was specified.

Jurists also rendered the agency valid if the principal said: "buy me a donkey" or "buy me a horse", without specifying either the price or the characteristics. In this case, jurists ruled that variation within the named type is small, and that the type is implicitly known by the status of the principal. However, jurists rendered the agency invalid if the principal said: "buy me a sheep" or "buy me a cow", since the characteristics of the named sheep or cow cannot be inferred from the status of the principal. Hence, they require naming either the characteristics or the price in the latter case.

- On the other hand, the ignorance is considered major if the genus of the object of purchase is not known. Thus, the Hanafis forgive certain types in trading agencies that they do not forgive in sales. Their demarcation in the case of trading agency is determined by the level of excessive ignorance, which renders the sale invalid for most of their jurists, and that which renders the sale non-binding for a few others.³¹

An examples of excessive ignorance that invalidate a trading agency is the case where the principal says to the agent: "buy me a dress", "buy me an animal", or "buy me a house", etc. In such cases, the named object of purchase (animal, house, etc.) can apply to many different things of different genera (e.g. cotton dress, silk dress, etc.). Thus, it is necessary for the agency to be valid that the principal specifies the genus and type of the object of purchase, e.g. "buy me a cotton dress made in Damascus", "buy me wheat for \$x", or "buy me so many pounds of wheat", etc.³²

³¹ *Al-Gharar wa 'Atharuhu fī Al-'Uqūd* by Dr. Al-Darīr (p.559).

³² Al-Sarakhsī (1st edition (Hanafi), vol.19, p.38 onwards), Al-Kāsānī ((Hanafi), vol.6, p.23), 'Ibn Al-Humām ((Hanafi), vol.6, p.27 onwards), 'Ibn 'Abidīn ((Hanafi), vol.4, p.420; vol.7, p.365).

Chapter 54

Legal Status

A valid agency contract has consequences for the legal status of the agent's actions, his legal rights in trading, and whether what he holds as part of the agency is considered a trust or a guaranty.

54.1 Agent s actions

The agency contract establishes the agent's right to take the actions specified in the contract. In what follows, we shall consider the types of actions that agents can and cannot take in the most common types of agency contracts.

54.1.1 Attorneys

Attorneys are legal agents who represent the principal in courts of law and other legal proceedings. Such agents are eligible for four types of actions:

Admission of legal rights

The majority of Ḥanafi jurists agree that a legal representative is eligible to make admissions of rights and responsibilities short of those admissions that would result in the necessity of exacting a legal punishment or physical revenge (*qisāṣ*). In this regard, a legal agent is hired to answer the charges against his principal, and such answers may require denials or positive admissions.¹ 'Abū Ḥanīfa and Muḥammad restricted the attorney's eligibility for admissions of rights and obligations in courts of law, while 'Abū Yūsuf asserted his eligibility in courts of law as well as elsewhere.

Zufar, Mālik, Al-Shāfi‘ī, and 'Aḥmad ruled that the attorney in an unrestricted legal agency is not eligible to make admissions on behalf of his principal. This ruling is based on the view that the attorney is hired to represent

¹ Al-Kāsānī ((Hanafi), vol.6, p.24), 'Ibn Al-Humām ((Hanafi), vol.6, p.10), Al-Sarakhsī (1st edition (Hanafi), vol.19, p.4 onwards), 'Ibn 'Abidīn ((Hanafi), vol.4, p.430), 'Abd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.151).

the principal in a dispute, while admissions are a means to ending disputes and reaching friendly resolutions. Thus, the attorney does not have the right to admit the rights of his principal's adversaries, in analogy to his inability to exonerate adversaries of their obligations. This is in contrast to denials of the claims of the adversary, which are means to resolve the dispute legally in favor of his principal.²

The Mālikis allowed an exception to this general ruling in cases where an agent with power of attorney is given the right to make admissions in the agency contract. They also considered the attorney eligible to make admissions if the principal's adversary stipulated that eligibility as a condition for agreeing to dispute the matter with his attorney.

The general difference in opinion between the Ḥanafis and the other jurists rests on their differing opinions regarding the general rule that general rulings imply all their specific instances. Thus, the Ḥanafis ruled that the superset of rulings clearly implies its subsets, and thus the unrestricted legal agent is necessarily eligible for admissions. On the other hand, the non-Ḥanafis ruled that the general statement of unrestricted agency does not necessarily imply eligibility for admission, unless the latter is mentioned explicitly. Thus, not only do the non-Ḥanafis ruled that an unrestricted agent is not eligible to make admissions, they also ruled that there are implicit restrictions on such agents. Thus, they ruled that an unrestricted trading agent is not allowed to trade at unreasonable prices that deviate significantly from market levels, or to trade with deferment, etc. In fact, they argued that the agent is implicitly restricted to trading at market prices, since convention dictates that this is what is expected of a trading agent.³

In addition, the Ḥanafis who permitted unrestricted legal agents to make legal admissions on behalf of his principal also differed among themselves over the types of admissions that they may make:

- 'Abū Ḥanīfa and Muhammad ruled that agent admissions are only valid in a court of law, and only if the admission does not lead to the establishment of a legal punishment or legal revenge against the principal. The first restriction to courts of law is based on the fact that the agent is commissioned to represent the principal in legal disputes, and the latter only take place formally in a court of law. As proof of this claim, they noted that the agent and his principal are not obliged to answer legal questions except in such courts of law, which are thus the only formal venue for resolving and judging legal disputes.
- 'Abū Yūsuf ruled that the legal agent is permitted to make admission on behalf of his principal in courts of law and elsewhere. His proof is the fact that the principal himself can make such admissions in courts of law and elsewhere. Thus, the agent can make the same admissions that the

²Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.297), Al-Dardīr ((Mālikī)A, vol.3, p.379), 'Abū 'Ishāq Al-Shirāzī ((Shāfi'i), vol.1, p.351), 'Ibn Qudāmah (, vol.5, p.91).

³Takhrīj Al-Furū' c'alā Al-'Uṣūl (p.100).

principal can make, and he can make them at all the venues that the principal can make them.⁴

Finally, there are circumstances where all the jurists agree that the legal agent is not permitted to make admissions on behalf of his principal:

- The Ḥanafīs all agree that the agency contract explicitly mentions that the agency is only for disputing, and excludes the right to admit rights of the adversary or accept the credibility of his witnesses. In such cases, they ruled that agent would be restricted to denying the rights of the adversary and asserting the rights of his principal. On the other hand, if the agency contract was concluded without any restrictions and the listed exceptions were added thereafter, 'Abū Yūsuf ruled that the exceptions would apply, while Muḥammad ruled that the agency remains unrestricted.
- All jurists agree that an admission of an obligation on a small child by his father, legal guardian, or judge-commissioned arbiter is not allowed.

Collecting compensation

The majority of Ḥanafīs ruled that a legal agent in financial disputes is eligible to collect the financial compensation that the judge rules for his principal. They reasoned that when the principal empowered the legal agent to represent him in the dispute, he automatically entrusted him to collect financial compensations, since the latter is the natural end of legal disputes of a financial nature.

However, Zufar ruled that the agent is not eligible for collecting the financial compensation, since his agency is restricted to disputation to establish the principal's right. Eligibility for such disputation, he argued, does not imply eligibility to collect financial compensations.⁵ In this regard, the author of *Al-Hidāyah* said that the opinion of Zufar is the one most Ḥanafīs accepted in later times. This ruling was based on the fact that agents are not trusted in all respects, and thus one who is trusted in disputation may not be trusted in financial receipt.⁶

The Shāfi'īs and Ḥanbalīs also ruled that a legal agent is not eligible to collect financial compensations, since he is neither permitted to take receipt of such compensation explicitly, nor is it customary for legal agents to take receipt of financial compensations. They based this ruling on the fact that empowering the legal agent to establish the principal's legal rights does not imply that the principal accepts entrusting him with his compensation.⁷

Friendly settlements and exoneration

The Ḥanafīs and Shāfi'īs ruled that a legal agent in legal disputation is not eligible to reach friendly settlements, or to exonerate the adversary, on his principal's

⁴ Al-Ķasānī ((Hanafi), ibid.), 'Ibn Al-Humām ((Hanafi), vol.6, p.102 onwards).

⁵ Al-Ķasānī ((Hanafi), vol.6, p.24 onwards), 'Ibn Al-Humām ((Hanafi), vol.6, p.96).

⁶ 'Ibn Al-Humām ((Hanafi), vol.6, p.97), Al-Sarakhsī (1st edition (Hanafi), vol.19, p.19), *Majma' Al-Damānat* (p.261).

⁷ 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.351), 'Ibn Qudāmah (, vol.5, p.91).

behalf.⁸

Agents commissioning agents

The legal agent in a legal dispute is not permitted to commission a second agent without his principal's consent. In this regard, attorneys vary in their abilities, and the principal accepted the first person as his agent, and he may not accept the second.⁹

54.1.2 Debt demanding agents

Early Hanafi scholars considered agents for demanding debts to be automatically agents for its collection. However, later Hanafi jurists argued that convention dictates that debt-demanding agents are not eligible for actual collection of the debts. In this regard, the Hanafi school puts conventional practice ahead of early opinions in their school.¹⁰ Moreover, the agent for demanding the payment of debts are not permitted to commission a second agent, since agents vary in their abilities, and the principal may not accept to have the second one demanding his debtors for payment.

54.1.3 Debt collecting agents

The three major Hanafi jurists differed in opinion regarding whether or not a debt collecting agent is eligible to act as a legal agent if the debtor disputed the debt:

- 'Abū Ḥanīfa ruled that the debt collecting agent is eligible to act as the principal's agent in a legal dispute regarding the debt. Thus, if he is given sufficient proof that the principal had received the debt or exonerated the debtor, such a proof would resolve the legal dispute.

This ruling was based on the view that the debt-collecting agent is essentially an agent for exchanging the money he receives for the credit owed to his principal. This view of debt collection as a commutative financial contract is necessitated by the fact that debts are paid by their equals. Hence, debt-collection cannot be viewed as a return, and it must be considered a financial exchange of money for credit. In such financial commutative contracts, the agent is the contracting party, and he is responsible for all dealings. For instance, in a sales contract, the trading agent is the contracting party, and he is responsible to ensure that what he buys is free of defects, etc. Similarly, the debt-collecting agent is the contracting party in debt-collection, and thus he is eligible to engage in legal disputes to collect that debt.

⁸Ibn 'Ābidīn ((Hanafi), vol.7, p.365), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'i), vol.1, p.351).

⁹Al-Sarakhsī (1st edition (Hanafi), vol.19, p.12).

¹⁰Al-Kāsānī ((Hanafi), vol.6, p.25), 'Ibn Al-Humām ((Hanafi), vol.6, p.97), Al-Sarakhsī (1st edition (Hanafi), vol.19, p.67 onwards), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.429), 'Abd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.150).

- 'Abū Yūsuf and Muḥammad ruled that the debt-collecting agent is not eligible to act as an agent in legal disputes regarding the debt. In this regard, they argued that debt-collection and legal disputes are two different acts. Thus, one who is entrusted to represent the principal in collection may not be trusted as a legal agent in disputes. It follows that the principal in a debt-collection agency contract does not authorize the debt-collecting agent to act as a legal agent in disputes.
- We have seen in the previous subsection that all three jurists agreed that a debt-demanding agent is authorized to collect the debt, since they argued that this is the natural conclusion of a legal dispute. This, as we have seen, is contrary to the opinion of Zufar and later Ḥanafīs, which stipulates that the principal only agreed to commissioning the agent in the legal dispute, but he may not trust him to collect and deliver the debt.

On the other hand, all Ḥanafīs agreed that an agent who is sent to collect a specific non-fungible is more like a messenger than an agent. In this case, there is no exchange involved, and hence the agent is only authorized to receive the item, and may not act as the principal's legal agent. Thus, if the person from whom he tries to collect refuses (e.g. if he provides proof that he bought the item from the principal), then the agent must wait for the principal to resolve the matter.

They also agreed that an agent who is sent as a monitoring agent, to ensure that the debtor pays his debt, is not authorized to collect the debt, or to engage as an agent of the creditor in legal disputes.

Finally, all Ḥanafīs agree that an agent in a preemption contract or a return of defective merchandise is eligible to engage the adversary as a legal agent of his principal. In this regard, preemption is similar to new sales, and returns are also a form of exchange that can be classified as a commutative financial contract. Thus, an agent who is empowered to effect such an exchange is also empowered by his principal to engage in legal disputes regarding the rights upon which such an exchange is based.¹¹

The Shāfi'īs and Ḥanbalīs each had two opinions regarding the debt-collecting agent's eligibility for engaging in legal disputes:

- Most of the Ḥanbalīs, and a few of the Shāfi'īs, ruled that an agent in a collection contract is eligible to engage in legal disputes, whether what he is commissioned to collect is fungible or non-fungible. They based this ruling on the fact that the agent cannot collect the principal's right without proving his entitlement, and thus convention dictates that he is entitled to engage in legal proceedings to prove such entitlement.
- Most of the Shāfi'īs and a few of the Ḥanbalīs ruled that permission to act as an agent in collecting debts does not imply a permission to engage

¹¹ Al-Sarakhsī (1st edition (Ḥanafī), vol.19, p.17), Al-Kāṣānī ((Ḥanafī), vol.6, p.25), 'Ibn Al-Humām ((Ḥanafī), vol.6, pp.99-102), 'Ibn 'Ābidīn ((Ḥanafī), vol.4, p.429), 'Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.2, p.150).

in legal disputes. Thus, they ruled that the latter permission, if it is not stated explicitly, cannot be inferred based on convention.

The two schools had similar splits of opinion regarding agents in preemption and returns of defective merchandise.¹²

Commissioning an agent

The general rule among Ḥanafī jurists states that an agent is not permitted to commission a second agent to perform the task given to him without the principal's permission. The reasoning behind this rule is that the principal's acceptance of the first agent's opinions, abilities, and trustworthiness does not necessarily translate to accepting the same attributes of the second agent. However, the application of this general rule varied depending on the nature of the agency contract:

- If the agency contract was completely unconstrained, for example if the principal told the agent to do whatever he sees fit, then the agent may commission a second agent for debt-collection.
- However, if the principal did not explicitly give the agent full discretion to do as he sees fit, he is not entitled to commission a second agent for debt-collection. In this case, if the first agent does in fact commission a second agent, and the second agent does collect the debt, the debtor is not exonerated from the debt. In this regard, the second agent is not an agent of the principal creditor, and hence his receipt does not constitute repayment of the debt. However, once the second agent gives whatever he received to the first agent, the debt would be considered repaid to the creditor's legitimate agent, and hence the debtor would then be exonerated of the debt.

On the other hand, if the received property perishes in the second agent's possession, prior to delivery to the first agent, the second agent must guarantee the property to the debtor. The second agent may then demand compensation from the first agent, since the latter deceived him into an invalid agency contract, and thus must take responsibility for the former's guaranty. In the meantime, the debtor is not exonerated of the debt, and the creditor may still demand and receive repayment of the debt.¹³

The Mālikīs ruled generally that an agent is not permitted to commission a second agent to perform the task commissioned to him. As an exception, they allowed an agent to commission a second one if the task commissioned to him is not appropriate given his status (e.g. if he is a nobleman and the task is menial).¹⁴ Along somewhat similar lines, the Shāfi‘īs and Ḥanbalīs ruled that

¹² Abū-‘Ishāq Al-Shīrāzī ((Shāfi‘ī)), vol.1, p.351), ‘Ibn Qudāmah (, vol.5, p.91 onwards).

¹³ Al-Kāsānī ((Hanafī)), vol.6, p.25), ‘Ibn Al-Humām ((Hanafī)), vol.6, p.89 onwards).

¹⁴ Al-Dardīr ((Mālikī) A, vol.3, p.388).

an agent may not commission a second agent to perform his task, unless he is incapable of performing that task.¹⁵

Receiving compensation for debts

An agent for collecting a fungible debt is not permitted to collect a non-fungible item in lieu of the debt. Such receipt would constitute a financial exchange, which he was not authorized to conduct as part of debt collection.¹⁶

Multiple debt collectors

If a principal commissions two agents to collect a debt, neither one of them is entitled to collect it on his own. In this case, the principal only expressed trust in both of them combined, and not in either of them by himself. Thus, if one of them were to collect the debt on his own, the debtor is not exonerated of the debt until both agents are simultaneously in possession of what one of them received, or until the debt is repaid to the principal. Once either of the latter two conditions is satisfied, the legal status of the debt is equivalent to simultaneous receipt by both agents.¹⁷

Collecting defective goods

If a debt collecting agent collects the debt and finds that the paid goods were defective, then he may return whatever part the principal could have returned, and receive its non-defective replacement. In this regard, the agent takes the principal's place in all his rights pertaining to receiving the debt in acceptable condition.¹⁸

Unauthorized agency

If a person claims that he is the agent of an absent creditor and demands payment of the debt, then if the debtor believes him, he must pay him the debt he owes the principal. In this regard, believing the claimant of agency is equivalent to admission that he must pay him what he owes, and thus he must in fact make that payment. In this case, if the claimed principal confirms the presumed agent's claim, then there is no problem. However, if the claimed principal denies that the debt collector was his agent, we must consider three cases:

1. If the debtor had believed the presumed agent and paid him the debt, he must re-pay it to the creditor. In this regard, the principal's denial of agency means that the debtor is not exonerated of the debt. In this case, the creditor's claim is accepted if he supports it with an oath, since

¹⁵ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.226), 'Ibn Qudāmah (, vol.5, p.88).

¹⁶ Al-Kāsānī ((Hanafi), ibid., p.26).

¹⁷ 'Ibn Al-Humām ((Hanafi), ibid., p.86 onwards).

¹⁸ Al-Kāsānī ((Hanafi), ibid.).

the default is non-payment, the debtor is claiming having paid it, and the creditor is denying that claim. We have previously seen that the general rule in such circumstances is the acceptance of a denier's claim if he supports it with his oath.

The debtor must thus re-pay the debt a second time to the creditor, and then demand repayment from the one who claimed agency. The latter demand is supported since he only paid him the money to be exonerated of his debt, and that effect was never realized. Thus, the debtor may negate the claimed agent's receipt and demand repayment of what he gave him. However, if the first repayment was lost in the possession of the one who claimed agency, the debtor may not demand repayment of its equivalent from him. This follows from the fact that by believing his claim of agency, the debtor admitted his right to receive the money, and hence he is not responsible to guarantee what he received. In this regard, even though the debtor was wronged by having to repay his debt twice, that wrong cannot be righted by wronging another.

This ruling is different from the case where one who claims to be an agent demands to collect the deposit of a presumed absent principal. In this case, the depositary is not required to deliver the deposit to the claimed agent, even if he believes him. In this case, believing the agent is tantamount to admitting a third party's ownership (the depositor). In contrast, ownership of a debt is established for the party of the contract, and thus admitting agency in debt collection establishes ownership for the debt-collector, and the debtor must pay.

2. If the debtor believed the claimant of agency, he can pay the debt to him, but also establish an agent-guaranty, by saying: "You must guarantee whatever I give you against claims of the creditor; thus whatever the creditor later takes from me, I can take back from you". In this case, the debtor establishes a separate contract with the one claiming agency, whereby anything later taken by the creditor is considered usurped from the vantage point of their side contract. In this regard, the debtor's condition is tantamount to the one claiming agency volunteering guaranty of any further receipt from the creditor. Of course, the latter guaranty is a valid one, since all guaranties of future obligations are permissible.
3. If the debtor did not believe the claimant of agency, but still paid him the debt, then if the creditor later demands repayment of the debt, the debtor may demand compensation from the claimed agent. In this case, by not believing the claimed agent, the latter has the status of a usurper, and the debtor may demand that he returns what he usurped. Even if the debtor was not sure whether or not he believed the claimed agent, paying him would be driven by hope that the creditor would accept his agency. If the creditor later refuses to accept that agency, that hope would be void, and the debtor may still demand repayment from the claimed agent, since he

gained nothing by paying him.¹⁹

54.1.4 Selling agent

If the selling agent is restricted in his authorized actions, then he is bound by whatever restrictions the principal stipulates in the contract. If the agent does not abide by those stipulated restrictions, the principal is not responsible for his actions, unless the deviation from stipulated restrictions was beneficial to him. Otherwise, if the agent violates some restrictions and the violation does not benefit the principal, the sale would not be executable unless the principal approves of the agent's action. Thus, if the principal ordered the agent to sell an item for \$1,000, and he sold it for more than that, the sale is considered executed, but if he sold it for less, the sale is not executed. Many other instances may be enumerated, interpreting various aspects of the sale as beneficial to the principal or otherwise:

- If the principal orders the agent to sell with a deferred price, and he sells with an equal cash price, the sale is executed. However, if he asked him to sell it with a cash price, and he sold it with a deferred price, the sale is suspended pending the principal's approval.
- The Shāfi'īs and Ḥanbalīs ruled that if the principal specified a particular place in which the agent should sell, based on knowledge that the price in that place is higher, then the agent is not permitted to sell the item elsewhere. The Ḥanafīs also made the same ruling provided that the principal's language clearly denied the agent's right to sell elsewhere, e.g. "do not sell the item any place other than A".
- If the principal specifies a time period in which to sell the item, the agent must sell it then, since the timing of a sale may result in certain benefits.
- If the principal specifies a buyer to whom the agent must sell the item, he is not allowed to sell it to another, since the principal may prefer selling to that particular person.
- If the principal orders the agent to sell a certain amount of the good (e.g. 100 units), he is not allowed to sell less than that, since that would constitute a violation of the principal's command.

On the other hand, if the agent was unrestricted in his selling, 'Abū Ḥanīfa ruled that he may thus trade at any price, even if it deviates significantly from market levels. They also permit him to trade with a non-fungible price, or a deferred price, etc. His ruling is based on the view that unconstrained agency means just that: that the agent is allowed to sell in any way he deems fit, and conventional behavior is not considered in this case. In this regard, he argued that conventions vary dramatically, and trading away from market prices may

¹⁹Ibn Al-Humām ((Hanafi), vol.6, p.113 onwards), Al-Kāsānī ((Hanafi), vol.6, p.26), Majma' Al-Damānāt (p.253), ^cAbd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.152).

be strategically beneficial in seeking profits. Thus, he argued that unstable conventions may not be used to add artificial restrictions to an unrestricted contract.

However, the majority of later Ḥanafīs, including Al-Tahāwī accepted the opinion of 'Abū Yūsuf and Muḥammad that the unrestricted selling agent is in fact subject to a number of implicit restrictions. Thus, they ruled that he may only sell for a price that is legal tender, and close to market values. Al-Tahāwī quoted Muḥammad's criterion for closeness to market value in *Al-Jāmi'* *Al-Saghīr* as any price within 5% of the going market price. This ruling is based on the view that "unrestricted" selling agencies are in fact bound by what is conventionally expected of selling agents. Thus, their view is that unrestricted trading agencies more generally are in fact implicitly governed by conventional behavior, in analogy to buying agents.²⁰

A better measure of significant deviation from market prices was narrated to be reported by Muḥammad in *Al-Nawādir*. His view was that any deviation that falls within the appraisal range is minor, otherwise, it is considered significant injustice (*ghabn fāhish*).²¹ In legal circles, *Majallat Al-'Aḥkām Al-Adliyyah* (item #165) ruled that excessive injustice is determined in terms of deviations from market prices that equal or exceed: 5% for mobile goods, 10% for animals and livestock, and 20% for immobile real estate.

The non-Ḥanafī jurists also accepted the dominant Ḥanafī ruling that the selling agent may not sell at a price that is significantly lower than the going market rates without his principal's permission. They based this ruling on the view that the agent should always seek to maximize the principal's benefits and minimize his losses. They also ruled based on convention to restrict the selling agent to accepting prices in legal tender currencies, and if there are multiple such currencies, to choose the one that is most widely accepted in practice.²²

The same difference in opinion, between 'Abū Ḥanifa on the one hand, and the rest of the jurists on the other, also applies to implicit restrictions of selling agents to selling with a cash price. Thus, 'Abū Ḥanifa ruled that an unrestricted selling agent can sell with a cash or deferred price, while the other jurists ruled that convention dictates that he would be restricted to selling for a cash price. In this respect, the majority argued that trading is normally conducted with a cash price, and that credit sales are rare, and used only in times of economic recession.²³

²⁰ Al-Kāsānī ((Hanafi), vol.6, p.27), Al-Tahāwī ((Hanafi), p.111), 'Ibn 'Ābidīn ((Hanafi), vol.7, p.383), 'Ibn Al-Humām ((Hanafi), vol.6, p.70 onwards), *Majma'* *Al-Damānāt* (p.249), *Mukhtaṣar Khalīl* (p.216 onwards), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'i), vol.13, p.563), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.353 onwards), *Al-Kāfī* by 'Ibn Qudāmah (vol.2, p.254), Al-Buhūti (3rd printing (Hanbali), vol.3, p.463 onwards).

²¹ 'Ibn Al-Humām ((Hanafi), ibid., pp.76-7), Al-Kāsānī ((Hanafi), vol.6, p.30), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.425).

²² Al-Dardir ((Mālikī)A, vol.3, p.382), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.353 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.223 onwards), 'Ibn Qudāmah (, vol.5, p.124), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.298), *Qawā'id Al-'Aḥkām* by Al-'Izz ibn 'Abd Al-Salām (vol.2, p.107).

²³ibid.

As we shall see in the following subsection, this difference in opinion does not exist in the case of purchasing agents. In that case, all jurists agreed that the purchasing agent is implicitly restricted to buy at or near the going market price. The reason 'Abū Ḥanīfa distinguished between the cases of buying and selling agents is the fact that a purchasing agent may buy an item for himself, and then if he does not like it or feels that the price was too high given its quality, he may then claim that he bought it on behalf of his principal. This possibility, he argued, is not present in the case of selling agents.²⁴

Partial sale

If a selling agent sells part of what he was commissioned to sell, we consider two cases:

1. If the merchandise is not affected adversely by division, for instance for all fungibles measured by weight or volume, all Ḥanafī jurists agree that partial sales are permitted.
2. On the other hand, if the merchandise is harmed by division (e.g. if the agent was commissioned to sell a book and sold half of it), then 'Abū Ḥanīfa considers the sale permissible. His logic is that the agent was commissioned to sell the full merchandise at a given price, and if he manages to sell part thereof for the same price, the principal would clearly benefit by receiving the price and keeping part of his merchandise.

On the other hand, 'Abū Yūsuf, Muḥammad, the Shāfi'īs and the Ḥanbalīs ruled that such a sale is only permitted if the principal gave his permission, or if the agent managed also to sell the other part. They based this ruling on the view that selling part of conventionally indivisible merchandise is potentially harmful. Thus, the partial sale is not permitted to avoid such harms. While the Shāfi'īs and Ḥanbalīs accepted the logic of 'Abū Yūsuf and Muḥammad,²⁵ the Mālikīs disallowed partial sales based on the view that an unrestricted agent is always implicitly restricted by convention.²⁶ In this regard, it is unconventional to sell parts of books or other indivisible goods.

This division in opinion only pertains to partial sales of a selling agent. In the case of a purchasing agent, all jurists agree that partial purchases at the full price are not allowed. The reason 'Abū Ḥanīfa's opinion is different in the cases of selling and buying agents is the above-mentioned possibility for a buying agent to buy on his own behalf and then make the purchase on behalf of the principal if he finds it disadvantageous.

²⁴ Al-Kāṣānī ((Hanafī), ibid.), 'Ibn Al-Humām ((Hanafī), ibid., p.75), 'Ibn Ḩabīb ((Hanafī), vol.4, p.424), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.13, p.573), 'Ibn Qudāmah (, vol.5, p.127).

²⁵ 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.353), 'Ibn Qudāmah (, vol.5, p.126)

²⁶ Al-Dardīr ((Mālikī)A, vol.3, p.381).

Exonerating a buyer of the price

'Abū Ḥanīfa ruled that a selling agent is eligible to exonerate the buyer of the price, defer its receipt, take another compensation in lieu of the price, or transfer liability for the price to a third party. In all such cases, he ruled that the selling agent would guarantee the price for his principal. This ruling was based on his view that receipt of the price is the agent's right in the sales contract, and thus all the above listed dealings are also permissible for him. However, he must guarantee the price for the principal, since he dealt on his own behalf, but caused the property of another (the principal) to perish through the sale, and hence he must guarantee it.²⁷ On the other hand, 'Abū Yūsuf and Muḥammad ruled that the selling agent is not allowed to do any of the above, since they ruled that such dealings would constitute dealing in the property of the principal without his permission.

Commissioning a second agent

Jurists agree that a restricted selling agent is not permitted to commission a second agent to take his place without his principal's permission. The logic of this ruling, as we have seen, is the fact that agents vary in their abilities and trustworthiness, and hence the principal's choice of one agent does not imply acceptance of another.²⁸ However, they enumerated a few exceptions to this general rule:

1. If the task (e.g. selling livestock in the market) is not appropriate for the social status of the commissioned agent who is a nobleman.
2. If the commissioned tasks are numerous, and cannot all be accomplished by the agent without help.
3. If the task (e.g. designing and building a bridge) requires specific skills (e.g. engineering and physical) that are not possessed by the agent.

On the other hand, the Ḥanafīs and Mālikīs permitted an unrestricted agent to commission a second general in all circumstances.

Dubious dealings

A selling agent is not permitted to sell to himself, since that would raise suspicions. Moreover, since a selling agent is the official seller in the sales contract, he cannot also be the buyer, lest there be only one party to the sales contract. As we know, jurists have stipulated multiplicity of the contracting parties as a condition of sales.

'Abū Ḥanīfa also prevents a selling agent from selling below or at market prices to his father, grandfather, son, and other relatives whose testimony would

²⁷ Al-Kāṣānī ((Hanafī), vol.6, p.28), *Majma' Al-Damānāt* (p.245).

²⁸ Al-Kāṣānī ((Hanafī), ibid.), 'Ibn 'Abidīn ((Hanafī), vol.7, p.356), Al-Dardīr ((Mālikī)B, vol.3, p.513), Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.226), 'Ibn Qudāmah (, vol.5, p.88 onwards).

not be accepted to support him in a court of law (e.g. wife, grandson, etc.). He reasoned that sales to such individuals are equivalent to sales to oneself, since the family members often share in property utilization and financial benefit. Thus, selling to such individuals at or below market prices would raise suspicion that he favored them (and thus himself) at the expense of his principal. Indeed, this suspicion of conflict of interests is the reason such individuals' testimony would not be accepted to defend him in a court of law.

On the other hand, 'Abū Yūsuf and Muhammad ruled that the selling agent may sell to such close family members (excluding himself) at the market price. In this regard, they argued that if he is not restricted with regards to buyers, selling to family members or others should raise no suspicion. In this regard, they argued that family members do not share ownership of properties, and hence do not share in the benefits derived from such properties.²⁹

The Mālikīs ruled that a selling agent may not sell what he was commissioned to himself, or anyone for whom he serves as a legal guardian (be it his child, or a mentally incompetent person whose dealings he administers). However, they permitted selling such items to his wife or child of legal age, provided that he does not sell to them below the market price. Moreover, one narration stated that 'Imām Mālik permitted a selling agent to sell to himself.³⁰

Most of the Shāfi'īs and some of the Hanbalis (accepting one of the reported opinions of 'Ahmad) ruled that a selling agent may not sell to himself or his underage child. However, they permitted such an agent to sell to his father, grandfather, child of legal age, or other independent members of his family. For the latter class of people, if he sells the goods at the same price he would sell them to anyone else, there is no suspicion, in analogy to selling to a friend.³¹

Thus, we have seen that the Hanafis categorically forbade a selling agent from selling himself. On the other hand, the majority of other jurists permitted such agent sales to himself if the principal approves them, and forbid them otherwise. The Mālikīs also added two other conditions for the validity of agent sales to himself: (1) the principal must be present during the sale session, and he does not forbid it, (2) the price must be explicitly stated during that session.

We have also seen that 'Abū Ḥanīfa forbade selling agents from selling to fathers and paternal grandfathers, wives, and sons and grandsons, while the majority of jurists permitted sales to fathers and paternal grandfathers at the market price. In my opinion, the opinion of 'Abū Ḥanīfa is more appropriate, especially in our day and age, to avoid unnecessary suspicions.

In general, a selling agent has to meet the obligations with which the principal commissioned him. The principal, on his part, is obliged to bear all financial losses that are not caused by the agent's negligence or transgression. If the agent meets his obligations, the principal is also required to pay any wages that are

²⁹ Al-Kāsānī ((Hanafi), ibid.), 'Ibn Al-Humām ((Hanafi), vol.6, p.67 onwards), 'Ibn 'Ābidīn ((Hanafi), vol.4, p.424), *Majma' Al-Damānat* (p.261).

³⁰ Al-Dardīr ((Mālikī)A, vol.3, p.387 onwards), 'Ibn Qudāmah (, vol.5, p.107), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.77 onwards).

³¹ Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2, p.224 onwards), 'Ibn Qudāmah (, vol.5, p.107 onwards).

stipulated in the agency contract.

54.1.5 Buying agent

We have already discussed in previous sections the effect of ignorance (*jahāla*) on general and specific buying agencies. In what follows, I shall discuss the dealings of a buying agent in restricted and unrestricted agencies.³²

Restricted buying agency

In restricted buying agencies, the agent must try to abide by the stipulated restrictions as much as possible, whether those restrictions pertain to the merchandise or the price. If the agent does not abide by the contract's restrictions, the principal is not bound by his dealings, unless the deviation from stipulated restrictions benefited him. In what follows, we discuss a few specific circumstances to illustrate how the bindingness of the agent's dealings is determined:

- Merchandise restriction: If the principal commissioned the agent to buy a U.S.-manufactured refrigerator, but the agent bought one that was manufactured elsewhere, the agent is bound by the sale, but the principal is not. Thus, the restriction of the country of manufacture is considered a beneficial restriction, and it must be observed.
- Price restriction: If the principal commissioned the agent to buy a refrigerator for \$300, but the agent bought one for more than the specified price, the agent is bound by the sale, but the principal is not. Thus, by deviating from the principal's condition, the agent is considered to have bought the refrigerator for himself.

On the other hand, if he bought a refrigerator that normally sells for \$300, and paid \$200 for it, the principal is bound by the sale since the deviation was beneficial.

- If the principal commissioned the agent to buy a certain quantity of merchandise, but the agent only bought a portion thereof, then the ruling depends on whether or not the merchandise is divisible. If the merchandise is not divisible (e.g. a car), then the principal is not bound by the partial purchase. However, if the merchandise is divisible (e.g. a lot of land), the Ḥanafīs, Shāfi‘īs, and Ḥanbalīs ruled that the partial purchase would be binding on the principal.
- If the principal commissioned the agent to buy for a deferred price (or in installments), and he bought with a cash price, the purchase would be binding on the agent.

³² Al-Kāsānī ((Hanafi), vol.6, p.29 onwards), 'Ibn Al-Humām ((Hanafi), vol.6, p.75 onwards), Al-Taḥāwī ((Hanafi), p.110 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.19, p.39), 'Ibn c-Ābidīn ((Hanafi), vol.4, p.421 onwards), *Majma' Al-Damānāt* (p.249).

On the other hand, if the principal commissioned the agent to buy for a cash price, and he bought for a deferred price, the sale is binding on the principal. In this case, even though the agent violated the letter of the contract, he is abiding by its purpose.

- If the principal commissions the agent to buy with an option clause, and he buys without one, the sale would be binding on the agent.
- If the principal commissions the agent to buy a specific object, and he buys another, the Ḥanafīs ruled that the principal is given an option whether to accept the purchased object or return it. The other jurists ruled in this case that the sale is binding on the agent.

In general, the Ḥanafīs ruled that a buying agent's violation of agency restrictions would render the agent as the buyer. However, if the violation benefits the principal, all jurists agree that the principal would be bound by the sale. This is in contrast to the case of a selling agent, where violation of agency restrictions would render the sale suspended pending the principal's approval. As we have seen, the difference between the two cases is the suspicion associated with the buying agent's ability to exploit the agency to his advantage. Thus, jurists ruled that violations of agency restrictions render the sale binding on the buying agent to avert the suspicion.³³

As a consequence of those rules, if a buying agent is commissioned to buy one sheep for one Dinār, and he buys two sheep for that Dinār, the Ḥanafīs ruled that the sale is binding on the principal, since the restriction violation was to his benefit. The Mālikīs also ruled in this case that the principal is bound by that sale without any options. On the other hand, the Shāfi‘īs and Ḥanbalīs only consider the sale binding on the principal if at least one of the sheep was worth the one Dinār at market prices, in accordance with the story of ‘Urwah Al-Bāriqī's buying agency on behalf of the Prophet (pbuh).³⁴

Unrestricted buying agency

In unrestricted buying agencies, the agent's actions are only restricted by proven conventions, which are treated as implicit restrictions. Thus, if the principal commissioned an agent to buy a donkey for a specified price, and the agent bought a single-eyed one for that price, ’Abū Ḥanīfa renders the sale binding on the principal, since he met the explicitly specified restrictions. On the other hand, ’Abū Yūsuf and Muhammad ruled that donkeys are conventionally bought for transportation, and if the defect prevents the purchased animal from being used thus, the sale should not be binding on the principal. Thus, the latter two jurists argue that convention adds an implicit restriction that the purchased animal be free of defects that prevent it from performing customary tasks.

³³ Al-Sarakhsī (1st edition (Hanafi), vol.19, p.117).

³⁴ Ibn Ḩāfiṣ (Hanafi), vol.7, p.311), *Mukhtaṣar Khalīl* (p.217), Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.75), ’Abū-’Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.355), Al-’Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.13, p.584), Ibn Qudāmah (, vol.5, p.128).

Also, if the principal commissions the agent to buy a specified object, but does not name a price, Ḥanafī jurists agree that the sale is binding on the principal if the agent buys near or below the market price. However, if the agent buys the specified object at a substantially higher price than the going market prices of similar objects, the sale is binding on the agent, and not on the principal.³⁵ In this regard, minor injustice is tolerated to make agency feasible, but excessive injustice (i.e. excessively high prices) can easily be avoided, and agent purchases at such prices should not be made binding on the principal. We have previously seen that the Ḥanafī demarcation between excessively and moderately high prices is determined by the range of prices assessors of the object may specify.

The Ḥanafis also ruled that to avoid potential disagreements, the principal should state the genus and characteristics, or the genus and price, of the merchandise that should be bought. Otherwise, if the principal commissions the agent in an unrestricted fashion (e.g. “buy me whatever you deem appropriate”, there would be differences of opinion. In the latter case, 'Abū Ḥanīfa ruled that any purchase would be binding on the principal, while 'Abū Yūsuf and Muhammad ruled that the agent would be implicitly restricted by convention. It is thus better to make commissions sufficiently restricted to avoid such differences in opinion.³⁶

The Mālikīs, Shāfi'īs, and Ḥanbalis ruled that the buying agent in an unrestricted agency is bound to buy at or near market prices, and he may not buy at substantially higher prices unless he obtains the principal's permission. This ruling is based on the view that the agent is forbidden from causing financial harm to the principal, and buying at substantially higher prices violates such positive consideration of the principal's benefits.³⁷ Similarly, the buying agent should not knowingly buy defective merchandise, since he was not commissioned to buy such defective goods, and the principal may not be able to return the merchandise based on the defect.

Jurists also ruled that if a principal commissioned a buying agent to buy a specific item on his behalf, the agent may not then buy it for himself. In this case, if the agent does indeed buy the item for himself, it will be legally considered a purchase on behalf of the principal. This ruling follows since the agent's purchase of the item for himself would require relieving himself from the agency contract. Such relief of agency can only be effected in the presence of the principal, and hence the sale would still be considered effective for the principal. On the other hand, if an agent is commissioned to buy an item that is not individually specified, then he may buy such an item for himself, unless he purchases it with the intention that it is for the principal.

³⁵We have seen previously that all Ḥanafī jurists agree that excessive injustice in buying is not binding on the buyer, but that jurists differed in the case of selling agents. In the latter case, 'Abū Ḥanīfa ruled that an excessively unjust sale is binding on the principal, while 'Abū Yūsuf and Muhammad ruled that convention would apply in this case to render the sale non-binding on the principal.

^{36c}Abd Al-Ghanī Al-Maydānī ((Ḥanafī), vol.3, pp.142,147).

³⁷Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.298), Al-Dardīr ((Mālikī)A, vol.3, p.283), 'Abū 'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.354), 'Ibn Qudāmah (, vol.5, p.124).

The Hanafīs, Shāfi‘īs, and Hanbalīs, as well as most Mālikīs, agree that a buying agent is not permitted to buy from himself, in similarity to the selling agent’s prohibition of selling to himself. The Hanafīs and Shāfi‘īs based this ruling on their view that the buyer rights of the sale contract pertain to the buying agent, and hence he cannot be simultaneously the buyer and the seller. Jurists also forbade a buying agent to buy from himself in order to avoid the suspicion that he may be benefiting at the expense of the principal. An exception to this general rule was reported, whereby ‘Imām Mālik was narrated to have permitted a buying agent to buy from himself at a price that benefits the principal.³⁸

‘Abū Ḥanīfa forbade a buying agent to buy from his father, grandfather, child, step-child, or anyone else whose testimony on the agent’s behalf would not be accepted in a court of law. On the other hand, ‘Abū Yūsuf and Muhammad ruled that such purchases are permitted provided that the purchase price is near or below the market price of similar items. Rulings of other schools regarding buying from near relatives have been discussed in previous sections. For instance, the Mālikīs permit a buying agent to buy from his wife and child of legal age or sell to them, as long as he does not favor them with unreasonable prices.

The language used in an agency contract is commonly interpreted based on conventional usage in the relevant time and place. In the remainder of this section, we shall discuss some specific juristic rulings on the wording of buying agency contracts and their implications:

- If an agent is commissioned to “buy food”, this is conventionally understood to mean wheat and wheat flour.
- If an agent is commissioned to “buy meat”, this is conventionally understood to refer to the type of meat most commonly bought at the market (e.g. lamb, beef, etc.). Moreover, the wording implies the purchase of raw meat rather than cooked or roasted meat, unless the principal and agent were traveling. Also, the unqualified term “meat” would not be understood to mean bird meat, wild animal meat, fish, live animals, or un-skinned meat. The unqualified term would also exclude animal organs such as lungs, liver, etc., since convention dictates that such organs are not called “meat”.
- Convention also dictates that if an agent is commissioned to “buy fish”, the term refers to large fresh fish, rather than small or salted fish.
- If an agent is commissioned to buy “a head” it is understood to mean an uncooked head of sheep, rather than a cooked sheep head or the head of cows or other eaten animals.
- If an agent is commissioned to buy “fruits”, the term would refer to any fruits that are commonly sold in the market. If he is commissioned to buy

³⁸Ibn Rushd Al-Ḥafid ((Mālikī), ibid.), ‘Ibn Qudāmah (, vol.5, p.107 onwards), Al-Shāfi‘ī ((Shāfi‘ī), vol.2, p.85).

“eggs”, that is understood to mean chicken eggs. If he is commissioned to buy “milk”, the term is understood to mean the milk that is most commonly sold in the market (e.g. cow milk, goat milk, etc.).

The agent-principal relationship

If a buying agent uses his own money in the purchase and receives the merchandise, without an explicit permission from the principal, he may still demand reimbursement of the price from the principal. In this case, the permission to buy the specified goods using the agent’s own money is implicit in the agency contract. This follows from our later discussion, which shows that the contract rights pertain to the contracting parties, and since the principal is aware of the price at which the goods are purchased, he implicitly approved the agent’s purchase at that price.

In this case, the buying agent is permitted to withhold the merchandise until he receives reimbursement of the price from the principal, even if he had not yet paid the price to the seller. In this regard, the agent’s relationship to the principal is that of the seller, who may demand full payment of the price before he delivers the merchandise.

If the goods were to perish in the agent’s possession prior to withholding them from the principal, then they are considered to perish in the principal’s property. In this case, the principal is still obligated to pay the price, since the agent’s possession is equivalent to his own.

On the other hand, if the goods were to perish in the agent’s possession after he withheld them from the principal to collect the price, ’Abū Yūsuf ruled that the agent must thus guarantee the goods in analogy to the pawn-broker’s guarantee of pawned property in his possession. Thus, he ruled that the agent in this case owes the principal the lesser of the goods’ value and the price paid. Zufar considers the agent’s guarantee in this case to be analogous to the guarantee of a usurper, and thus requires that the agent owes the principal equivalent goods or their value, no matter how high. Finally, ’Abū Ḥanīfa and Muḥammad consider the agent’s guarantee in this case to be analogous to the guarantee of a seller for the withheld sold merchandise. Thus, they ruled that the price, whatever it may be, is dropped, and the principal no longer owes it to the agent.³⁹

54.2 Contract rights, and status

Contract rights are those actions that must take place for the purpose of the contract to be satisfied. For instance, the rights of a sale contract include delivery of the merchandise, receipt of the price, return of defective merchandise

³⁹ ^c Abd Al-Ghanī Al-Maydānī ((Hanafī), vol.2, p.143), *Al-Hidāyah* (vol.3, p.140), ’Ibn Ābidīn ((Hanafī), vol.7, p.304), *Hāshiyat Al-Dusūqī* (vol.3, p.381), ’Abū-Ishāq Al-Shīrāzī ((Shāfi’ī), vol.1, p.353), Al-Buhūtī (3rd printing (Hanbalī), vol.3, pp.460,467).

or based on inspection or condition options, and guarantee or returning the price if the merchandise is proven to belong to a third party.

In agency contracts, jurists agree that the contract rights pertain to the principal if the agent identifies him as the contracting party in contracts that require offer and acceptance (e.g. sales). On the other hand, the non-Hanbālī jurists ruled that if the agent names himself as the contracting party in trading, then all contract rights pertain to him. Thus, they ruled that the agent would be the party responsible for receipt or delivery of the price or merchandise, and legal disputes required to return defective merchandise, etc. However, as we shall see below, the Ḥanbalīs ruled that the contract rights still pertain to the principal, even if the agent names himself as the buyer or seller.

The Ḥanafīs classified contract rights in agencies into three categories: (1) those where the only rights are those with which the agent was commissioned, as in debt-demanding agencies, and agencies to follow someone⁴⁰ until he pays his debts; (2) contracts whose rights pertain to the agent; and (3) contracts whose rights pertain to the principal.

54.2.1 Unidentified principal

Ḥanafīs stipulated a general rule for contracts in which the agent does not need to name the principal. In all such contracts, e.g. sales, leases, settlement based on admission, etc., the contract rights pertain to the agent, unless the agent explicitly names the principal in the contract. Thus, provided that the agent is eligible for the relevant legal rights, i.e. if he is not a young child, etc., and if he is not a judge or a judge's agent to act on behalf of the principal, the agent would be responsible for all the contract rights. Such rights include delivering sold items, receiving prices, demanding prices for sold items, entering into legal disputes to return defective merchandise, guarantee the prices of sold items that belonged to a third party, etc.

In the general case, the agent is responsible for all such rights, and he therefore has the right to commission a second agent to administer the contract rights. In this case the original principal has no right to administer any of those affairs as long as the first agent continues to act in his agency capacity. Thus, if the principal were to demand delivery of the price from the ultimate buyer, the buyer may refuse to pay it to him, since he conducted the sales contract with the agent, and the principal is thus alien to that contract. However, if the buyer were in fact to pay the price to the principal, that would be acceptable. In the latter case, the agent should not demand the price payment from him any longer, since he would have to return whatever he thus collects from him after the price was paid to the principal.

54.2.2 Identified principals

Ḥanafīs also stipulated a general rule for contracts in which the agent needs to name the principal. Examples of such contracts include marriage, divorce,

⁴⁰Usually an annoying person that the debtor would like to be rid of.

divorce at the instance of the wife, financial compensation for murder and other financial settlements, etc. In such contracts, all the contract rights pertain to the named principal, and the agent is considered to be merely a messenger. Thus, dowry must be demanded from the principal, and the agent cannot be demanded to pay it unless he explicitly guaranteed it in the contract. Similarly, a woman's agent in marriage is neither entitled to receive the dowry, nor responsible to take her to her husband. In all other named contracts, the named principals have the rights and obligations to demand or pay compensations, respectively, and the agents have none of those rights or obligations.

54.2.3 Property receipt agents

For contracts that are concluded through receipt, e.g. gifts, loans, simple loans, pawning, etc., the Ḥanafīs ruled that the principal must be named in the contract, and thus all contract rights would pertain to him. However, if the principal is not named in such contracts, then the agent is considered the contracting party, and all contract rights would thus pertain to him.⁴¹

As they commonly do, the Ḥanafīs mention in their books that the Shāfiʻīs disagree with their rulings in this regard, thus assigning the contract rights to the principal in all cases.⁴² However, proper scholarship dictates that we use each school's own references for reporting their opinions. In this regard, Al-Nawawī stated in his *Al-Minhāj* that the contract rights pertain to the agent rather than the principal, thus agreeing with the Ḥanafī opinion in this case.⁴³ The Mālikīs also ruled that the contract rights pertain to the agent rather than the principal.⁴⁴

In contrast, the Ḥanbalīs ruled that contract rights pertain to the principal, and not to the agent. This follows from their general consideration of an agent as a mere messenger of the principal, where the latter is considered the default contracting party, unless otherwise specified.⁴⁵ This Ḥanbalī opinion seems to negate the very purpose of agency. In fact, a principal commissions an agent to reduce his responsibilities in terms of managing his affairs, or to find someone who can carry-out those duties of which he is incapable. Thus, if all contract

⁴¹ Al-Tahāwī ((Hanafī), p.109), Al-Kāsānī ((Hanafī), vol.6, p.33 onwards), 'Ibn Al-Humām ((Hanafī), vol.6, p.16 onwards), 'Ibn ʻĀbidīn ((Hanafī), vol.4, p.419), *Majmaʻ Al-Damānāt* (p.243), ʻAbd Al-Ghanī Al-Maydānī ((Hanafī), vol.2, p.141).

⁴² c.f. Al-Kāsānī ((Hanafī), vol.6, p.22), Al-Zaylaʻī ((Hanafī Jurisprudence), vol.4, p.256), 'Ibn ʻĀbidīn ((Hanafī), vol.6, p.17).

⁴³ Al-Ramīlī ((Shāfiʻī), vol.4, p.47), Al-Khaṭīb Al-Shirbīnī ((Shāfiʻī), vol.2, p.230 onwards), 'Abū-'Ishāq Al-Shirazī ((Shāfiʻī), vol.1, p.353).

⁴⁴ Al-Qarāfī ((Mālikī), vol.3, p.506 onwards), *Al-Mudawwanah Al-Kubrā* (1323 A.H. edition, vol.10, pp.83, 186). In Al-ʻAllāmah Khālid's book, and the commentary by Al-Dardīr (vol.3, p.382): the buyer may ask the agent to return the price if the object is defective or proven to belong to a third party, provided that he does not know that he is an agent (in analogy to the ruling for sales brokers). However, if he knows that the seller was a legally unauthorized, he must demand the price return from the principal. Finally, if the agent is known to be legally authorized (*mufawwad*), then the buyer has the option to demand repayment from the agent or the principal, since a legally authorized agent is similar to a legally authorized partner.

⁴⁵ Al-Buhūtī (3rd printing (Ḥanbalī), vol.4, p.467), 'Ibn Qudāmah (, vol.5, p.97), Marī ibn Yūsuf (1st printing (Hanbalī), vol.3, p.156), *Maṭālib ʻUli Al-Nuhā* (vol.3, p.462).

rights are referred back to the principal, this objective underlying the agency contract would not be attained.⁴⁶

This difference in opinion among the various juristic schools applies only to the case where the agent does not explicitly specify that the contract is conducted on behalf of his principal. On the other hand, if the agent makes it clear that the contract is being conducted on behalf of his principal, all juristic schools agree that the contract rights would thus pertain to the principal rather than the agent.

54.2.4 Rights and duties of trading principal and agent

In summary, we can enumerate the rights and responsibilities of the principal and agent in a buying or selling agency. In what follows, we list the rights and responsibilities of the principal, and then those of the agent.

Principal responsibilities and rights

- The principal in a selling agency is responsible for any losses that are not the result of the agent's transgression or negligence. He is also responsible to pay the agent's wages after concluding his work, if the agency contract stipulated the payment of such wages.
- The principal in a buying agency is responsible to pay the price of purchased items. He is also liable to incur any losses caused by the agent's actions, provided that such losses did not result from the agent's transgression or negligence. Finally, if the agency contract stipulates wages for the agent, the principal is responsible to pay the wage once the agent finishes his work.
- In both buying and selling agencies, the principal's right is the agent's fulfillment of his obligations as stipulated in the agency contract.

Agent responsibilities and rights

- The agent in a selling agency is required to abide by the conditions and restrictions stipulated in a restricted agency contract. In unrestricted agency contracts, he is required to abide by convention and common custom in his dealings.
- The agent in a buying agency is required to buy near the going market prices for similar goods, in accordance with convention. In addition, various juristic schools added other responsibilities:
 - The non-Hanafi jurists also stipulate that a buying agent is required to buy goods that are free from defect.

⁴⁶ *Al-'Amwāl wa Nazariyyat Al-'Aqd* by Dr. Muḥammad Yūsuf Mūsā (p.376).

- The Ḥanafīs forbid a buying agent from buying the specified items for himself or a close relative.
- The Mālikīs stipulated generally that the agent must do his best to maximize the principal's benefit.
- The Ḥanafīs also ruled that if the agent violates any of the principal's conditions, he is considered to be buying for himself.
- A buying agent has the right to buy at a lower price than the one specified by the principal, since this deviation is beneficial. He also has the right to demand reimbursement from the principal for any items that he purchases under the agency contract with his own money. Finally, while the purchased item is in the possession of the buying agent, he has the right to return it if he discovers a defect.

54.2.5 The contract's legal status

The legal status of the contract is its objective. In what follows, we shall discuss the legal status of agency in a variety of contracts for completeness.

1. Sales contracts

In sales and other contracts that require offer and acceptance, the legal status of the contract is establishment of the buyer's ownership of the merchandise and the seller's ownership of the price. In this regard, jurists agree that if such contracts are conducted through an agent, the legal status of the contract pertains to the principal and not the agent. This follows from the fact that the agent speaks and contracts on behalf of the principal, thus acting as his commissioned legal representative. The Mālikīs require in this case that the agent declare in the contract that he is acting on behalf of his principal, while the majority of jurists assign the contract's legal status to the principal regardless if the principal or the agent are named as the contracting party.

Thus, all four major schools of jurisprudence decided that ownership resulting from the contract is assigned immediately to the principal (i.e. without first being assigned to the agent and then transferred). This view follows from the fact that the agent acts on behalf of his principal as commissioned.⁴⁷ As a consequence, if a Christian or Jewish agent buys wine or pork on behalf of his Muslim principal, the sale is rendered invalid, since the Muslim principal cannot own such items. This is indeed the opinion of all four schools, including the Ḥanafīs, despite some Ḥanbalī and Mālikī books claiming incorrectly that the Ḥanafīs consider ownership to be established first for the agent, and then to be transferred to the principal.

⁴⁷ Al-Zayla^{cī} ((Ḥanafī Jurisprudence), vol.4, p.256), *Al-Farā'īd Al-Bahiyya fī Al-Qawā'id Al-Fiqhīyya* by Shaykh Mahmūd Ḥamza (p.137), 'Ibn Qudāmah (, vol.5, p.130), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i)), vol.2, p.229 onwards), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.298), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.356).

2. Contracts concluded by receipt

In contracts such as gifts and simple loans, where the contract is only concluded through receipt, the contract's legal status pertains to the principal. This conclusion stands even if the agent were to name himself as the gift-giver or lender, since the agent in such contracts is a simple middle-man.

3. Marriage

In marriage contracts, the legal status pertains to the party named in the contract. Thus, if the agent names his principal as the marrying party, the principal would thus be married. However, if the agent names himself, as in saying: "I marry you", then the agent would have married, and not the principal.

4. Divorce

The rules governing the legal status of divorce are identical to those of marriage if the agent represents the husband. However, if the agent represents the wife, he must name her in the contract, buy saying: "divorce so-and-so, according to the following terms".

54.3 The agent s possession

Jurists agree that an agent's possession is one of trust, in analogy to deposits and similar possessions. This ruling follows from the fact that he would thus possess goods as a legal representative of the principal (who is the owner). Thus, his possession is similar to that of a depositary, following its rules for trust and guaranty. Thus, if the agent only guarantees the held object in cases of transgression and negligence, otherwise the principal bears all losses. In this regard, if there is a dispute between the principal and agent, wherein the principal claims that the agent must guarantee the item and the agent denies such guaranty, the agent's claim is accepted.⁴⁸

'Ibn Qudāmah explicitly discussed six common cases of principal-agent disputes over guaranty, which I list here briefly:

1. If the agent declares that the principal's property perished, became defective, or was lost while in his possession, and the principal denies his claim, the agent's claim is accepted by all jurists if supported by his oath. In this case, the agent is a trustee, and proving his claim is difficult. Thus, unlike the case of a depositary who needs to provide proof, the agent need not produce a proof for his claim.

However, the Ḥanbalīs stipulated an exception in the case where the agent claims that the principal's property perished as a result of a fire, breakage

⁴⁸ Al-Kāsānī ((Ḥanafī), vol.6, p.34), *Majma' Al-Damānāt* (p.251), Khusrū (1304H (Ḥanafī), vol.2, p.287), 'Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.299), Al-Dardīr ((Mālikī)B, vol.3, p.519), Al-Khaṭīb Al-Shirbīnī ((Shāfi'i), vol.2, p.230), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'i), vol.1, p.357), 'Ibn Qudāmah (, vol.5, p.94).

and entry, or other observable events. In such cases, they ruled that the agent is required to provide proof for his claim.

2. The principal and agent may disagree over whether or not the agent was negligent in safekeeping the principal's property, or if he transgressed by violating the principal's conditions. For instance, the principal may claim that the agent over-loaded a transportation animal beyond its capacity, or was negligent in protecting it. Another example is the case where the principal claims that he ordered the agent to return his property, and that he did not and then lost it. In such cases, the majority of jurists ruled that the agent is a trustee and his claim against guaranty is accepted if backed by his oath. However, the majority of Mālikīs ruled in this case that the principal's claim is given precedence.⁴⁹

In this regard, most jurists agree that the agent is a trustee whether or not he is compensated for his agency efforts. This follows from the fact that the agent holds the principal's property as a commissioned legal representative to deal in such property. Thus, any loss in the agent's possession is considered equivalent to an equal loss in the possession of the owner-principal, and the agent only guarantees the property against losses caused by his own transgression.

3. The two parties may disagree over whether or not certain actions were taken. Thus, the agent may claim that he sold the merchandise and collected the price, while the principal may claim that he neither sold nor received a price, in which case they disagree over whether or not a sale took place. Alternatively, the principal may claim that the agent did sell, but never received a price, in which case they disagree over whether or not the price was received.

In this case, the Ḥanafīs and Ḥanbalīs ruled that the agent's claim is accepted. This opinion is based on the view that he has the right to sell the merchandise and to collect the price, and thus his claim must be accepted on both counts.⁵⁰

There are two reported opinions in the Shāfi'ī school for this case. The more correct of the two opinions is to accept the principal's claim if supported by his oath. This opinion is based on the view that the default case is one of non-trading and preservation of the principal's property in its initial state.⁵¹

4. The two parties may disagree over whether or not the agent delivered the object of the agency to the principal. Thus, the agent may claim that he delivered the principal's property to him, while the principal may deny that claim. In this case, the most accepted opinion in all four schools is

⁴⁹ Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.299 onwards).

⁵⁰ Al-Kāṣanī ((Hanafī), vol.6, p.36), 'Ibn Qudāmah (, vol.5, p.95).

⁵¹ Al-Khaṭīb Al-Shirbīnī ((Shāfi'ī), vol.2,p.235), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'ī), vol.1, p.357).

to accept the agent's claim, whether or not he received a compensation for his agency efforts. This ruling is based on the fact that the principal entrusted the agent. In the case of compensated agency, jurists note that the agent benefits from the objects of agency (the principal's property) through his work and effort. Thus, the agent cannot be considered to derive benefit from the object of agency itself, and his possession cannot be equated to that of a borrower (who does benefit from the item while it is in his possession).⁵²

5. The two parties may also disagree regarding the agency itself. Thus, one party may claim that he was commissioned as an agent, while the claimed principal denies that he commissioned such an agency. In this case, all four schools agree that the possible principal's claim is accepted if supported by his oath. This ruling is based on the view that non-agency is the default-state, and thus the claimed-agent was not an established trustee. Thus, the latter's claim cannot be accepted.⁵³
6. The two parties may also disagree over the nature of the agency. Thus, the agent may claim that he was commissioned to sell on credit, while the principal may claim that he only commissioned him to sell for cash. In any such case, all four schools agree that the principal's claim is accepted if supported by his oath. In this case, they ruled that the default in agencies is the impermissibility of various actions, and the principal knows better the limits of what he commissioned the agent to do.⁵⁴

In a buying agency, if the agent claims that he was commissioned to buy an item at a certain price, and the principal denies it, jurists differed in their opinions. Thus, the Hanafis ruled that the agent's claim is accepted if the purchased item's value was equal to the named price, otherwise they accept the principal's claim. On the other hand, the Shāfi'īs and Ḥanbalīs ruled that the agent's claim is accepted in either case if supported by his oath, since they ruled that he is a trustee.⁵⁵

The Mālikīs, and others, ruled that if the agent uses the principal's money to buy a good, and then the principal claims that he commissioned him to buy another good, the agent's claim is accepted if supported by his oath. Similarly, they ruled that if the agent sold the principal's good for a certain price, and the principal claims that he commissioned him to sell it at a higher price, the agent's claim is accepted if supported by his oath.⁵⁶

⁵² Al-Kāsānī ((Hanafi), ibid.), Al-Sarakhsī (1st edition (Hanafi), vol.19, p.10), 'Ibn Qudāmah (, ibid., p.96), Al-Khaṭib Al-Shirbīnī ((Shāfi'ī), vol.2, p.235), 'Abū-'Ishāq Al-Shirāzī ((Shāfi'ī), vol.1, p.358), 'Ibn Rushd Al-Ḥafid ((Mālikī), vol.2, p.299).

⁵³ 'Ibn Qudāmah (, ibid., p.97), Al-Khaṭib Al-Shirbīnī ((Shāfi'ī), vol.2, p.233), Al-Dardīr ((Mālikī)B, vol.3, p.393).

⁵⁴ ibid., 'Ibn Al-Humām ((Hanafi), vol.3, p.147).

⁵⁵ 'Ibn Al-Humām ((Hanafi), vol.3,p .144), Al-'Imām Al-Nawawī/Al-Subkī ((Shāfi'ī), vol.13, p.606), 'Ibn Qudāmah (, vol.5, p.95).

⁵⁶ Al-Dardīr ((Mālikī)A, vol.3, p.393), Al-Dardīr ((Mālikī)B, vol.3, p.521 onwards).

Chapter 55

Multiple agents

A single principal may have multiple agents in a variety of activities: trading, disputes, legal defense, etc. In this case, the Ḥanafīs ruled that if the principal conducts separate contracts with each of his agents, then each of them may act on his own, without consulting with the others. Thus, even if multiple agents were separately commissioned to perform the same task, any of them may perform that task on his own. On the other hand, if the agents are all commissioned in a single contract, the Ḥanafīs ruled that none of them is permitted to act on his own without the principal's permission. Exceptions to this latter ruling are cases where consultations have no effect (e.g. repayment of debts or returning deposits), or where joint actions are not possible (e.g. legal defense or divorce).

The other schools of jurisprudence had varying restrictions and rulings with regards to multiple legal agents:¹

- The Mālikīs permitted having multiple legal representatives in a legal dispute, provided that the adversary in the dispute accepts that multiplicity.
- The Shāfi‘īs ruled that none of the multiple legal agents is permitted to act alone in a legal dispute, since the principal only approved their joint representation in such disputes.
- There are two rulings in the Hanbalīs schools. The first ruling agrees with the Shāfi‘ī opinion, while the second relies on convention to permit each of the multiple legal agents to act alone.

We now proceed to discussing the specific applications of those general principles in agencies where consultation is required or not required.

¹Al-Dardir ((Mālikī)B, vol.3, p.505), Al-’Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.13, p.557), *Al-Furū‘* by ’Ibn Muṣlīḥ Al-Maqdīsī (vol.3, p.693).

55.1 Consultation agencies

If the nature of the agency requires consultation, then the principal is deemed to have only approved the joint action of all his agents, and no single agent is permitted to act alone. In what follows, we list some specific examples of this rule:

- Thus, if two agents are commissioned to sell an item, neither one may sell it without consulting with the other. In case one of the two selling agents sells the goods on his own, the sale is not valid until the other agent or the principal permit it. This follows since sales require consultation, and the principal only approved their joint judgment.
- If two buying-agents are commissioned, neither of them is permitted to buy on his own on behalf of the principal. In this case, if one of the buying agents does buy without the other's permission, the sale is concluded on his own behalf. This is in contrast to the case of selling agents, where the sale is suspended pending the other agent's or the principal's approval. The difference between the two rulings is explained by the fact that buying agents are subject to suspicion of strategic trading to benefit themselves, as we have seen in previous chapters.
- If two agents are commissioned to conclude a marriage, divorce, or other contract that contains a financial compensation, then neither of them is permitted to conclude the contract on his own. In such cases, consultation and debating different points of view is crucial to arriving at a wise decision.
- If two agents are commissioned to collect a debt, neither one is permitted to collect it on his own. This follows from the fact that the principal thus accepted their joint opinion, and trusted them jointly. This joint trust does not imply trusting the opinion or integrity of each agent individually.

55.2 No-Consultation agencies

On the other hand, if consultation is not necessary in conducting the object of the agency contract, then the Ḥanafīs ruled that any agent may act on his own. For instance, if two agents are commissioned to conclude a divorce without financial compensation, either one may conclude it. Other examples include returning deposits and repayments of debts. In such cases, they argue that the commissioned action is simple and does not require multiple actors or consultation. In contrast, the Mālikīs, Shāfi‘īs, and Ḥanbalīs ruled that if the principal commissions multiple agents, none of them is permitted to act on his own without consulting the other, unless the principal explicitly permitted them to act individually. This ruling is based on the general view that the principal in such

multiple-agent contracts only approves joint action, and thus individual action requires a special permission.²

In the case of multiple legal agents in a legal dispute, Zufar disagreed with the majority Ḥanafī view expressed above. In this case, the majority of Ḥanafis permitted each agent to act individually, since joint action is not feasible at many stages of the legal proceedings (e.g. arguing in front of a judge). Of course, drafting legal documents can be accomplished collaboratively, and the act of legal defense can be divided among lawyers, whereby each one does part of it. Therefore, they argued that the degree of collaborative or individual action can be determined based on the nature of the task at hand. On the other hand, Zufar argued that no individual legal agent is permitted to act individually in this case. His ruling is based on the fact that legal disputes require consultation and sharing of opinions. In this regard, the principal's joint commissioning of multiple agents implies his acceptance of their joint opinion, but does not imply his acceptance of any one agent's opinion.³

² Al-Kharshī (1317H, 1st and 2nd editions (Mālikī), vol.6, p.82), 'Abū-'Ishāq Al-Shīrāzī ((Shāfi'i), vol.1, p.351), 'Ibn Qudāmah (, vol.5, p.87).

³ Al-Kāsānī ((Hanafī), vol.6, p.32), 'Ibn Al-Humām ((Hanafī), vol.6, pp.86-88).

Chapter 56

Agency termination

Jurists agreed¹ that uncompensated agency is a permitted but non-binding contract for both parties. In this regard, the principal is not bound to the contract, since he may decide that it is beneficial to terminate the agency or to appoint another agent. On the other hand, the agent is not bound since fulfilling the responsibilities of agency may put excessive demands on his time. Thus, both parties to the agency contract are given the option of terminating the contract at their discretion.

In compensated agencies, we need to consider two cases:

- If the compensation is a *ji‘ālah*, whereby the task and the time period are not explicitly stated in the contract, then the majority of jurists agree that the contract is non-binding on the parties. However, the Mālikīs ruled that the contract is in this case binding on the principal once the agent begins working.
- If the compensation renders the contract an *’ijārah* (i.e. if the task or the time period is specified), e.g. in brokerage contracts, then the Ḥanafīs and most Mālikīs ruled that the agency contract is thus binding. In contrast, the Shāfi‘īs and Ḥanbalīs ruled that the contract is still not binding in this case.

In the remainder of this chapter, we enumerate the means by which an agency contract may be terminated:²

¹ Al-Kāsānī ((Hanafi), vol.6, p.37), ’Ibn ʻĀbidīn ((Hanafi), vol.7, p.351), Al-Hatṭāb (1st edition (Mālikī), vol.5, p.215), ’Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.297), Al-Khaṭīb Al-Shirbī ((Shāfi‘ī), vol.2, p.231 onwards), ’Abū-’Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.356), Al-’Imām Al-Nawawi/Al-Subkī ((Shāfi‘ī), vol.5, p.113), Al-Dardīr ((Mālikī)A, vol.3, p.396 onwards), ’Ibn ʻĀbidīn ((Hanafi), vol.4, p.433), Al-Jazīrī (1986, vol.3, pp.278-282).

² The Ḥanafī listing can be found in Al-Kāsānī ((Hanafi), vol.6, p.37 onwards), Al-Taḥāwī ((Hanafi), p.109), ’Ibn Al-Humām ((Hanafi), vol.6, p.123 onwards), Al-Sarakhsī (1st edition (Hanafi), vol.19, p.12 onwards), ’Ibn ʻĀbidīn ((Hanafi), vol.4, p.434), ʻAbd Al-Ghanī Al-Maydānī ((Hanafi), vol.2, p.145), ’Ibn ʻĀbidīn ((Hanafi), vol.7, p.308).

56.1 De-commissioning of the agent

All jurists agree that an agency contract is terminated if the principal terminates his commissioning of the agent. This follows from their reported opinion that the contract is valid but non-binding, and therefore it can be voided by the principal. However, the Ḥanafīs, and most of the Mālikīs required two conditions for the validity of this form of termination:

1. The agent must be informed of the termination. In this case, his de-commissioning is a form of contract voiding, which requires mutual knowledge. In this regard, the agent is deemed informed of his de-commissioning if the agent is present and informed in person, if he receives a written message informing him, if he receives a messenger, if he is informed by two witnesses or one trustworthy witness, or if he hears a single witness and believes him. Prior to the satisfaction of any of those conditions, while the agent is not informed of the de-commissioning, the status of all his legal actions continues as if his commissioning was still in place.

This condition was stipulated by the Ḥanafīs, most of the Mālikīs, and in one reported opinion of ʻImām ʼAlīmad. This condition is based on the fact that its absence can harm the agent in two ways: (1) his legal representation of the principal would end without his knowledge, and (2) he would become responsible for the contract's rights, thus having to pay the price in purchases, and having to deliver the goods in a sale.

In contrast, the better supported opinion of Al-Šāfiʻī, and the second opinion of ʼAlīmad that is accepted by his school, stipulate that this condition is not necessary. Thus, they ruled that the agent is de-commissioned as soon as the principal decommissions him, whether he is present or absent, knowing or unknowing. Their ruling is based on the view that de-commissioning is a form of contract-voiding that does not require the other party's consent, and thus does not require his knowledge, as in the case of divorce. This ruling is thus deduced in analogy to the case of commissioning an absent person, whereby the agent is thus commissioned without his knowledge.³

On the other hand, all schools agreed that if the agent de-commissions himself, he must inform the principal. This ruling is made to protect the principal's rights, and to avoid deceiving him.

2. The Ḥanafīs and most Mālikīs also ruled that validity of de-commissioning requires that no third party have a right pertaining to the agency. Thus, if a third party has a right in the agency, the de-commissioning is not valid without that third party's consent. For instance, if a debtor had commissioned an agent to sell a pawned object to pay the debt when it

³Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.298), Al-Dardīr ((Mālikī)A, vol.3, p.396), Al-Ḥaṭṭāb (1st edition (Mālikī), vol.5, p.214), Al-Khaṭīb Al-Shirbīnī ((Shāfiʻī), vol.2, p.232), ʼAbū-ʼIshāq Al-Shīrāzī ((Shāfiʻī), vol.1, p.356), Ibn Qudāmah (, vol.5, p.113 onwards), Marīt ibn Yūsuf (1st printing (Hanbali), vol.2, p.155), Ibn Juzayy ((Mālikī), p.329).

matures, the debtor-principal may not de-commission this agent without the creditor's consent. In this case the creditor's right of receiving the debt through the pawned object's sale prevents de-commissioning without his consent.

Another example is an agent commissioned by a man to divorce the latter's wife whenever he wishes to do so. In this case, the man may not de-commission that agent without the consent of the principal's wife.

A third example is a traveling debtor who - at the instance of the creditor – commissions an agent to take his place in disputes regarding collection of his debt. This agent cannot thus be de-commissioned, since the creditor would not have anyone from whom to demand repayment of the debt.

56.2 The principal performing the task

If the principal himself concludes the task for which he had commissioned an agent (e.g. if he sells the item for which a selling agent was commissioned), all jurists agree that the agency would thus be terminated.⁴ In such cases, the contract has no purpose or object, and thus the agent is automatically de-commissioned, even if he did not know.

56.3 Expiration of the reason for agency

If the agent concludes the task for which he was commissioned, the contract would also cease to have a purpose or object, and would thus be terminated.

56.4 Loss of eligibility

If either the principal or the agent dies or is afflicted by long-term insanity, the non-Shāfi'iis ruled that the agency is thus terminated. The Shāfi'iis, on the other hand, rendered the agency terminated even if the insanity was temporary. The definition of long-term insanity was a subject of debate between 'Abū Yūsuf and Muhammad. Thus 'Abū Yūsuf ruled that "long-term" meant one-month or longer, since a month-long insanity would drop the legal requirement to fast Ramaḍān. On the other hand, Muhammad ruled that "long-term" means one-year or longer, since a year of insanity is required to drop the legal requirement for all acts of worship. Qādī Zādah (who authored the continuation of 'Ibn Al-Humām ((Hanafi))) said that the chosen opinion among the Ḥanafis is that of 'Abū Ḥanīfa, which identifies "long-term" with "one-month". This is also the reported better opinion in 'Ibn 'Ābidīn ((Hanafi)), based on 'Abū Ḥanīfa's logic that anything less than a month is considered current and anything beyond a month is considered deferred.

⁴ Al-Sarakhsī (1st edition (Hanafi), vol.19, p.50), Al-Dardīr ((Mālikī)B, vol.3, p.523), Al-Buhūtī (3rd printing (Hanbali), vol.3, p.457).

All four schools agree that the agency is terminated if either party becomes legally restrained due to mental incompetence. The Shāfi‘īs also ruled that falling into a coma renders a party ineligible and terminates the agency, while the other schools disagreed with this ruling.

In the relevant cases, the Ḥanafīs, Shāfi‘īs, and Ḥanbalīs ruled that the agency is terminated based on loss of eligibility of one party, even if the other party is not informed.⁵ On the other hand, the Mālikīs ruled that the better opinion is not to de-commission the agent of a deceased person until he knows of the principal's death.⁶

56.5 Apostasy of the principal or agent

In this case, ’Abū Ḥanīfa ruled that the apostate principal is thus an enemy of Islām. In his opinion, the actions of such an apostate (including agency) are suspended. Thus, if he reverts to Islām, the actions would be executed, but if he dies an apostate or joins the “land of war”, the agency would be invalidated in his opinion. However, ’Abū Yūsuf and Muhammad ruled that the agency is not terminated, since an apostate's legal actions are executable. Thus, the agency is not terminated unless the apostate principal dies, is killed, or becomes a legal fugitive through a court-order to chase him.

On the other hand, Ḥanafīs argued that the agency is not terminated if the apostate agent joins the land of war, unless a judge orders him to be chased. Thus, they ruled that the agency remains intact. However, the agent is required not to take any actions unless he reverts to Islām. Then, if he does revert to Islām, Muhammad ruled that the agency is fully restored, since the impediment to his dealings would thus be removed. However, ’Abū Yūsuf ruled that by joining the “land of war”, the agent's status was that of a dead person, thus terminating his legal representation and agency. Once such representation is terminated, it cannot be restored.

The Mālikīs ruled that an apostate-agent is considered de-commissioned during the period when he is given a chance to revert to Islām (*'ayyām al-istitābah*). After this period, if he is killed, he is de-commissioned. However, if killing the apostate agent is delayed beyond that period (e.g. if she is a pregnant woman), jurists differed in opinion regarding whether or not the agent is thus de-commissioned. The Mālikīs also ruled that a Muslim agent is de-commissioned if the apostate-principal does not revert to Islām during the allowed period, even if he is not killed for a legal reason.⁷

The Shāfi‘īs and Ḥanbalīs ruled that an agency is not invalidated if the commissioned agent becomes apostate, whether or not he joins the “land of war”.

⁵ Al-Kāsānī ((Ḥanafī), vol.6, p.38), ’Ibn Al-Humām ((Hanafī), vol.6, p.126 onwards), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.232), ’Ibn Qudāmah (, vol.5, p.113), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.357), Al-Sarakhsī (1st edition (Hanafī), vol.19, p.13).

⁶ ’Ibn Rushd Al-Hafid ((Mālikī), vol.2, p.298), Al-Dardīr ((Mālikī)A, vol.3, p.396), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.232), ’Ibn Qudāmah (, vol.5, p.113), ’Ibn Juzayy ((Mālikī), p.329).

⁷ Al-Dardīr ((Mālikī)A, vol.3, p.396).

In this regard, they ruled that apostasy would not prevent such an agent from being commissioned anew, and does not prevent commissions from continuing, in analogy to other forms of disbelief. On the other hand, the Ḥanbalīs also ruled that apostasy of the principal does not invalidate agency for all the actions that the agent may take. This is also the majority Shāfi‘ī opinion, since the apostate's property rights are not terminated by apostasy.⁸

56.6 Agent self-de-commissioning

An agent may de-commission himself, in which case the agency is terminated.⁹ We have seen that some jurists required that the principal be informed of the self-de-commissioning to prevent any undue losses. In this regard, the Mālikīs ruled that an uncompensated agent may de-commission himself at any time, provided that the principal had not stipulated that he is not allowed to do so.

56.7 Perishing of the agency object

All jurists agree that if the object of the agency contract (e.g. the object to buy, sell, or lease) were to perish, the agency would be terminated.¹⁰ In this case, the agency contract would have no purpose, and thus it is voided.

56.8 Transfer of property

If the object of the agency contract (e.g. an object to sell or lease) ceases to be owned by the principal (e.g. if it is confiscated by the government), the agency contract is terminated.¹¹

56.9 Bankruptcy

The agency is terminated if its object is the property of a principal who declares his bankruptcy. In this case, by declaring bankruptcy, ownership of the principal's property is transferred to his legal adversaries, and thus the agency is terminated in accordance with the previous rule.¹²

⁸ Ibn Qudāmah (, vol.5, p.116), Al-Buhūtī (3rd printing (Ḥanbalī), vol.3, p.458), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.219), *Tuhfat Al-Muhtāh* (vol.5, p.341), ’Abū-’Ishāq Al-Shīrāzī ((Shāfi‘ī), vol.1, p.357).

⁹ Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.232), ’Ibn Juzayy ((Mālikī), p.329).

¹⁰ Indian Authors ((Hanafi), vol.3, p.493), ’Ibn Qudāmah (, vol.5, p.116).

¹¹ Al-Sarakhsī (1st edition (Ḥanafi), vol.19, p.50), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.232), ’Ibn Qudāmah (, vol.5, p.116).

¹² Al-Dardīr ((Mālikī)A, vol.3, p.396), ’Ibn Qudāmah (, vol.5, p.213).

56.10 Denial

The Ḥanafīs and Shāfi‘īs ruled that denial of the agency contract by the agent or principal is tantamount to voiding the contract, thus terminating the agency. On the other hand, the Ḥanbalīs ruled that such denial does not invalidate the agency contract.¹³

56.11 Transgression

If the agent transgresses against the object of agency (e.g. if he wears a dress he is commissioned to sell), there are two opinions in the Shāfi‘ī school. The first opinion renders the agency terminated, on the basis that it is a trust contract that is invalidated by such transgression. The second opinion states that the agency is not invalidated. What is invalidated according to this second opinion is the trust, while the agency remains intact and the agent is required to guarantee the object.¹⁴ I favor that second opinion, which was also the Ḥanbalī view.

56.12 Lasciviousness

The Shāfi‘īs and Ḥanbalīs ruled that an agency contract is invalidated by lasciviousness of the agent in a contract that is violated by such characterization (e.g. as an agent in making a marriage offer on behalf of the principal). In this case, the agent’s lasciviousness renders him ineligible to make a marriage offer for himself, and thus he cannot make it on behalf of his principal.¹⁵ This is in contrast to other types of agencies (e.g. acceptance of marriage, or trading) for which the agent’s lasciviousness does not render him ineligible, and where the agency remains intact.

56.13 Divorce

The Mālikīs ruled that if a husband serves as his wife’s agent, he is considered de-commissioned of his agency if he divorces her. This ruling follows since the husband has the right to divorce his wife. In contrast, a wife who is serving as her husband’s agent is not de-commissioned of her agency on behalf of her husband if he divorces her, unless it is known that the husband wishes to de-commission her.

The Ḥanbalīs also ruled that if a man commissioned his wife as an agent in some affair, that agency is not invalidated by divorce.¹⁶

¹³ Ibn ‘Abidīn ((Hanafī), vol.7, p.387), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.233), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.458).

¹⁴ Abū-‘Ishāq Al-Shirāzī ((Shāfi‘ī), vol.1, p.357), Al-‘Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.13, p.600).

¹⁵ Al-‘Imām Al-Nawawī/Al-Subkī ((Shāfi‘ī), vol.13, p.566), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.457).

¹⁶ Al-Dardīr ((Mālikī)A, vol.3, p.396), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.470).

56.14 Expiration

The Mālikīs, Shāfi‘īs, and Ḥanbalīs ruled that a timed agency is terminated once its stipulated period (e.g. ten days) expires. However, most Ḥanafīs favored the opinion that agency is not terminated thus.¹⁷

This was a listing of the most important manners in which an agency is terminated. With the exception of de-commissioning, the Ḥanafīs consider all the other reasons to be sufficient for terminating the agency, whether or not the agent is aware of that termination.

¹⁷Ibn ‘Abidīn ((Ḥanafī), vol.7, p.393), Al-Khaṭīb Al-Shirbīnī ((Shāfi‘ī), vol.2, p.233), Al-Buhūtī (3rd printing (Hanbalī), vol.3, p.460).

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